

No. 12951

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United States  
Court of Appeals  
For the Ninth Circuit.

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S. EINSTOSS,

Appellant,

vs.

JAMES V. COLE,

Appellee.

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Transcript of Record

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Appeal from the District Court for the Territory of Alaska  
Division Number One



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Appeal from the District Court for the Territory of Alaska  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

M. E. MONAGLE,

200 Seward Bldg.,  
Juneau, Alaska.

For the Plaintiff.

WILLIAM L. PAUL, JR.,

208 Franklin St.,  
Juneau, Alaska.

For the Defendant.





In the District Court for the Territory of Alaska,  
Division Number One, at Juneau  
Civil Action, File No. 6184-A

JAMES V. COLE,

Plaintiff,

vs.

SAM ASP and MAUDE ASP, Copartners, Doing  
Business Under Their Copartnership Trade  
Name of SALT SEA FISHERIES,  
Defendants.

### COMPLAINT

The plaintiff above named complains of the defendant and for cause of action alleges:

1. That the plaintiff is an individual, resident of Juneau, Alaska, and the defendants are copartners doing business under their copartnership trade name of Salt Sea Fisheries in Tenakee, Alaska, and within the jurisdiction of this Court.

2. That defendant owes the plaintiff the sum of Nine Hundred Twenty Seven and no/100 (\$927.00) Dollars for boat charter and skid pile driver rental for the period ending November 1, 1948, which amount defendant agreed to pay, but which has not been paid by defendants to plaintiff.

3. That plaintiff has been obliged to employ an attorney to institute and prosecute this action and that \$250.00 is a reasonable sum to allow plaintiff as and for attorney's fees.

Wherefore, plaintiff demands Judgment against

defendant in the sum of \$927.00, together with interest thereon at the rate of six per cent per annum from November 1, 1948 until paid, and for plaintiffs' costs and disbursements, including the sum of \$250.00 as and for attorney's fees.

/s/ M. E. MONAGLE,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska—ss.

James V. Cole, being first duly sworn, on oath, deposes and says: That I am the plaintiff in the above and foregoing action and have read said Complaint and know the contents thereof and that the same is true and correct as I verily believe.

/s/ JAMES V. COLE

Subscribed and Sworn to before me this 3rd day of October, 1949.

[Seal] M. E. MONAGLE,  
Notary Public for Alaska.

My commission expires March 1, 1950.

[Endorsed]: Filed October 3, 1949.

[Title of District Court and Cause.]

### WRIT OF ATTACHMENT

To the Marshal of the Territory of Alaska, Division No. 1, or to his deputy, Greeting:

Whereas, James V. Cole hath complained that

Sam Asp and Maude Asp, copartners, doing business under their copartnership trade name of Salt Sea Fisheries, are justly indebted to him to the amount of Nine Hundred Twenty Seven and no/100 (\$927.00) Dollars, and the necessary affidavit and undertaking herein having been filed as required by law.

We, Therefore Command You That you attach and safely keep so much of the property of said defendants not exempt from execution, or so much as may be sufficient to satisfy the plaintiff's demand, to be found in your Division of said Territory, as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said plaintiff herein, and of this writ make due service and return.

Witness, the Honorable George W. Folta, Judge of said District Court, and the seal thereof affixed at Juneau in said Territory, this 3rd day of October, 1949.

J. W. LEIVERS,  
Clerk,

[Seal] By /s/ LOIS P. ESTEPP,  
Deputy Clerk.

United States of America,  
Territory of Alaska,  
Division Number One—ss.

I hereby certify and return that I received the within and hereto writ of attachment at Juneau, Alaska, on the 3rd day of October, 1949 and that the same was served on October 3, 1949, at Juneau,

Alaska, by delivering to and leaving with Sam Asp a certified copy of the within writ and at the same time informing said Sam Asp that 85 cases of canned salmon at Tenakee, Alaska, was thereby attached and held in the possession of the United States Marshal;

I further certify that on October 5, 1949, at Juneau, Alaska, a certified copy of the within writ was served by delivering to and leaving with Cleo Commers, in charge of the Dock known as the Juneau Municipal Dock, and 100 cases of canned salmon belonging to the defendant were attached;

I further certify that on October 5, 1949, at Tenakee, Alaska, I delivered to and left with Mrs. Sam Asp a certified copy of the within writ, and attached 85 cases of canned salmon and posted on same a Notice of Attachment, at Tenakee, Alaska.

Dated at Juneau, Alaska, October 5, 1949.

WILLIAM T. MAHONEY,  
U. S. Marshal.

By /s/ WALTER G. HELLAN,  
Deputy.

Marshal's fees \$6.20.

[Endorsed]: Filed October 3, 1949.

[Title of District Court and Cause.]

**MOTION TO QUASH SERVICE OF WRIT**

Comes now S. Einstoss, garnishee-defendant in the above-entitled cause, and moves Court for an order quashing the levy of writ of attachment in this cause made by the United States Marshal at Tenakee, Alaska, on October 5, 1949, on eighty-five (85) cases of Coho Salmon: and for grounds, states that said salmon was then the property of movant and the defendant, above-entitled, has no interest therein.

/s/ WILLIAM L. PAUL, JR.,  
Attorney for S. Einstoss,  
Garnishee-defendant.

Copy received October 20, 1949.

/s/ M. E. MONAGLE,  
Attorney for plaintiff.

[Pencil note: Denied in effect 11/14/49.]

[Endorsed]: Filed October 22, 1949.

## DEFENDANT'S EXHIBIT A

In the District Court for the Territory of Alaska  
Division Number One, at Juneau

No. 6184-A

JAMES V. COLE,

Plaintiff,

vs.

SAM ASP, etc.,

Defendant.

United States of America,  
Territory of Alaska—ss.

K. William Oakson, being first duly sworn, on oath depose and say that I am agent for S. Einstoss and am duly authorized by him to make affidavits and claims of this nature on his behalf; that in the above-entitled action, by virtue of a writ of attachment issued by the above-entitled court, the U. S. Marshal on the 5th day of October, 1949, levied on 85 cases of 48 one pound cases each of silver or coho salmon in the warehouse of the defendant Sam Asp at Tenakee, Alaska; that said salmon has always been and now is the property of S. Einstoss and he is entitled to the immediate possession thereof; that during the fishing season of 1949, the defendant Sam Asp has been employed by S. Einstoss to can said salmon and such other salmon as said Einstoss delivered to the said Asp, that for such labor the said Asp received the actual cost of packing said salmon, that the said Einstoss has always been the owner of said 85 cases of salmon,

including the fish, cans, cases; that prior to the time of said levy of writ of attachment, all accounts between the said Einstoss and defendant Asp were and still are settled and for said 85 cases of salmon, the said Einstoss owes the said Asp nothing.

Affiant on behalf of his principal herewith demands the immediate release of said 85 cases of salmon from the levy of said writ of attachment.

/s/ K. WILLIAM OAKSON.

Subscribed and sworn to before me this October 14, 1949.

[Seal] By /s/ WILLIAM L. PAUL, JR.,  
Notary Public for Alaska.

My Commission expires January 19, 1952.

[Endorsed]: Filed November 10, 1949.

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[Title of District Court and Cause.]

### MOTION FOR SUMMARY JUDGMENT

Comes now S. Einstoss, Garnishee-defendant in this case, and moves for summary judgment in his favor that the eighty-five (85) cases of salmon, heretofore taken under attachment in this case at Tenakee, Alaska, be released and said levy quashed and for grounds refers to the affidavit and ex-



hibits attached hereto as well as other matters of record.

/s/ WILLIAM L. PAUL, JR.,  
Garnishee-defendant's  
Attorney.

Copy Received April 17th, 1950.

/s/ M. F. MONAGLE,  
Plaintiff's Attorney.

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[Title of District Court and Cause.]

AFFIDAVIT OF S. EINSTOSS ON MOTION  
TO QUASH LEVY OF WRIT OF ATTACH-  
MENT ON EIGHTY-FIVE CASES OF  
SALMON

United States of America,  
Territory of Alaska—ss.

S. Einstoss, being first duly sworn, on oath deposes and says that he is the Garnishee-defendant and third party claimant with relation to his motion to quash levy of writ of attachment on 85 cases of salmon at Tenakee, Alaska, on or about October 5, 1949, by the United States Marshal in this case.

That at the time of said levy, said salmon was worth, at the Seattle wholesale rate, \$16.75, and therefore was worth at Tenakee, Alaska, at the time of said levy \$15.75.

That during the Summer of 1949, affiant conducted a fish operation business in Southeastern



Alaska, part of which was the following arrangement: S. Einstoss and defendants entered into a contract, partly oral and partly written, by the terms of which affiant agreed to furnish fish, boxes, labels and all other materials necessary for the canning and preparing of salmon for transportation to defendants, and defendants agreed to can said salmon in the usual manner and prepare the same for shipment by means of using the supplies, materials and goods furnished by affiant. This oral contract was made on or about the 12th day of August, 1949, at Ketchikan, Alaska, and the written portions of said contract are evidenced in letters between affiant and defendants, some of which letters are attached hereto and made a part hereof by reference and marked "Exhibit——."

For the supervision of said contract and for the furnishing of said supplies and materials, affiant employed William Oakson, who has heretofore made and filed his affidavit, on my behalf, for the release of said salmon. That the said Oakson was duly authorized by me to make such claim on my behalf, having obtained such authorization shortly after the said levy by means of a long distance telephone conversation with me from Juneau to Ketchikan.

The said contract between me and defendants was also that the defendants were to have available at all times during the various salmon seasons of 1949, their plant at Tenakee, Alaska. That the said 85 cases of salmon were canned by defendants out of fish supplied by me and using materials such as cases, cans and salt supplied by me. That defend-

ants did not conduct any fish purchasing business of their own from which any salmon could have been canned and result in the said 85 cases of salmon.

That as part of said contract to can salmon for affiant, affiant agreed to pay the said defendants the sum of \$3.50 per case for furnishing labor, cans and services in the canning of said salmon. This sum is approximately standard rate in South-eastern Alaska for services performed. Said payment of \$3.50 per case does not include the furnishing by defendants of any materials or other things which are presently or have ever been in, on, or about said 85 cases of salmon, but consisted only of defendants furnishing labor, services and plant by which and in which to can said salmon.

On or about the 18th day of August, 1949, the affiant and defendants settled their accounts and affiant paid in full the defendants for any and all services performed under said contract for 1949, which settlement included payment to defendants, under said contract, for the canning of said 85 cases of salmon, and thereafter found that 972 cases of salmon had to be reconditioned at a rate of \$2.00 per case, in the amount of \$1,944.00, and after same were reconditioned, 278 cases were found not suitable for human consumption and therefore had to be destroyed. Therefore, under our agreement, Sam Asp had to repay me the above loss, but never did.

Affiant now owns and has always owned said 85 cases of salmon.

/s/ S. EINSTOSS

Subscribed and sworn to before me this 11th day of April, 1950.

[Seal] /s/ K. M. DOUGHERTY,  
Notary Public in and for the  
State of Washington.

My commission expires 7-8-52.

Cash Advanced to Asp

Cash .....	\$2,904.00
Wages paid in full.....	2,864.82
Advances .....	934.00
Groceries .....	124.70
Rent for Benny, Virgil et al.....	12.00
Freight on salt from Sup. Pkg. Co.....	8.00
Gloves .....	50.70
Cash to Sam Asp .....	80.00
Taxi .....	6.00
Hotel .....	5.65
Alaska Coastal Airline charter...	37.80
Alaska Coastal Airline charter...	10.34
Cash to Maud Asp .....	100.00
Airplane to Ketchikan.....	77.50
School Tax for Maud Asp.....	5.00
Wages for some Mexican paid by Boat	
Wilson .....	3.00
Wharfage and freight on salt.....	11.00
Wharfage and freight on salt.....	8.00

Check to Mr. Kemp for pipeline.....	150.00
Advance to Sam Asp .. .. .	150.00
Airline ticket to Ketchikan .. . . .	84.00
Hotel .. . . .	12.00
Harry Race Druggist (check) .. . . .	36.99
California Grocery .. . . .	173.23
Special Longshoring for Danny and others	10.00
Longshoring on Cape Spencer.....	101.75
Longshoring on Forester .. . . .	64.75
	<hr/>
	\$8,064.46
	\$7,897.96

O. K.

SAM ASP,  
By MAUD ASP  
Also MAUD ASP

Mr. S. Einstoss  
Ketchikan, Alaska

Dear Mr. Einstoss:

In accordance with our conversation we offer to pack for you canned salmon at our cannery at Tenakee, Alaska on the following terms and conditions:

We are to furnish all labor, oil for the cannery and cans.

We are to buy the fish for you at the going prices or prices authorized by you, and for the above services you are to pay us \$3.50 per case for packing salmon in tall cans of 48 cans to a case.

We agree to pay for your account exclusively

during the season of 1949. Any increase in the going price of fish must be authorized by you in writing only.

All expenses pertaining to chartering tenders, wages for the tenders is for your account.

You are to furnish money to pay for the fish. Also advance the money for the cans and freight.

We guarantee that we will pack fish that will pass the National Cannery inspection.

On the other hand we reserve the right to reject any fish that is not suitable for canning.

Payment to us to be made is as follows:

You are to put a man in charge and he is to pay for the fish and tenders. He is also to pay for the cannery labor and oil used in the cannery as an advance to us as payment on account. The above payments to be made in accordance with our instructions for which we will give him a receipt. You also to advance for the cans and freight for the cans. You will pay the balance of \$3.50 as soon as the fish is shipped and passes the National Cannery inspection. Should the National Cannery find any salmon packed by ourselves not suitable for human consumption you have the right to charge us with the amount of the cost of same.

Further, it is understood and agreed that in addition to the above mentioned advances, you are to pay us if any money is due about the time the fish is shipped with the exception of 50 cents per case until the fish passes the National Cannery inspection as above mentioned.

Your acceptance of the above constitutes a contract.

Your truly,

/s/ SAM ASP,

/s/ MAUDE ASP.

[Endorsed]: Filed April 19, 1950.

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[Title of District Court and Cause.]

AFFIDAVIT OF M. E. MONAGLE

United States of America,  
Territory of Alaska—ss.

M. E. Monagle, being first duly sworn, on oath, deposes and says: That heretofore and on October 22, 1949, S. Einstoss made and filed his Motion that the levy of the Writ of Attachment on 85 cases of salmon be quashed and said Motion was duly and regularly argued by attorneys for plaintiff and S. Einstoss before this Court on November 10, 1949, at which time this Court denied a Motion of S. Einstoss and to the best recollection of deponent stated that the question of the ownership of the attached salmon would be decided upon the evidence offered upon the trial of this case on its merits; that as a consequence of this Court's ruling plaintiff has not previously made any effort to obtain the testimony of S. Einstoss; that for all practical purposes the Motion of S. Einstoss for a Summary Judgment is exactly the same as his Motion that the Writ of



Attachment be quashed; that as soon as a Motion for Summary Judgment of S. Einstoss was served upon plaintiff's attorney on April 17, 1950, your deponent has been making a concerted effort to learn the present whereabouts of S. Einstoss in order to serve him with a subpoena, in order to have him present for the purpose of giving testimony when the Motion for Summary Judgment came on for hearing, but your deponent was unable to ascertain the whereabouts of said Einstoss until approximately 2:45 o'clock P.M. on May 1, 1950, at which time your deponent was reliably informed that S. Einstoss was in San Francisco, California, but would be in Ketchikan, Alaska, on or about May 15, 1950; that a subpoena has been issued out of and under the seal of this Court directed to S. Einstoss and requiring him to appear before this Court with his books and records on May 18th, 1950; that the plaintiff in this case cannot hope to successfully defeat the Motion for a Summary Judgment without the presence of S. Einstoss and his books and records; therefore, deponent prays that this Court either sustain its ruling that the question of the ownership of the 85 cases of salmon be disposed of at the time of the trial of this case on its merits, and refuse the application for Judgment, or in the alternative order a continuance of the hearing on said Motion to a day certain after May 15, 1950, so that the subpoena issued out of this Court in this case may be served upon S. Einstoss and he and his books and records are present in this Court for examination by plaintiff.

/s/ M. E. MONAGLE.

Subscribed and Sworn to before me this 2nd day of May, 1950.

[Seal]      /s/ FREDERICK O. EASTAUGH,  
Notary Public for Alaska.

My commission expires June 10, 1950.

[Endorsed]: Filed May 3, 1950.

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[Title of District Court and Cause.]

MOTION FOR CONTINUANCE OF HEARING  
ON THE MOTION OF S. EINSTOSS FOR  
SUMMARY JUDGMENT

Comes now plaintiff James V. Cole by his attorney and moves that this Court refuse the application of S. Einstoss for a Summary Judgment, or in the alternative that this Court grant a continuance to permit plaintiff to obtain the presence in Court of third party claimant, S. Einstoss, on the grounds that the material question involved was decided by this Court on November 10, 1949, on the Motion of third party claimant S. Einstoss to quash the Writ of Attachment herein; and, on the further grounds that the testimony of S. Einstoss is necessary for the presentation of plaintiff's essential facts in opposition to the Motion for a Summary Judgment, and plaintiff has been unable to serve S. Einstoss with a subpoena.

This Motion is based upon the records and files



of this case and upon the affidavit of M. E. Monagle hereto attached.

Respectfully submitted,

/s/ M. E. MONAGLE,

Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 3, 1950.

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In the United States District Court  
For the Territory of Alaska, Division Number One

United States of America,  
Territory of Alaska—ss.

### SUBPOENA

The President of the United States of America, .

To: S. Einstoss, Greeting:

You Are Hereby Commanded to appear before the District Court of the United States, for the Territory of Alaska, at Juneau, Alaska, in said District, on Monday, the 26th day of June, 1950, at 10:00 o'clock A.M. of that day, to testify as a witness on behalf of the plaintiff in the case of James V. Cole vs. Sam Asp and Maude Asp, copartners, doing business under their co-partnership trade name of Salt Sea Fisheries, and bring with you all books, papers and records with reference to your personal business transactions with Sam Asp and Maude Asp, individually or as co-partners doing

business under their co-partnership trade name of Salt Sea Fisheries, including all fish purchase and sales slips for the year 1949, all telegrams, letters and communications, or copies thereof, passing between you and either Sam Asp personally or Maude Asp personally, or Sam Asp and Maude Asp, co-partners doing business under their co-partnership trade name of Salt Sea Fisheries, and between you and K. W. Oakson, all payroll and tax records for the year 1949, all canceled checks for the year 1949, all shipping receipts and copies of bills of lading, way-bills and freight bills for the year 1949, and the original and all copies of any and all agreements entered into between you individually and Sam Asp individually and Maude Asp individually and Sam Asp and Maude Asp, co-partners doing business under their co-partnership trade name of Salt Sea Fisheries, and depart not the Court without leave thereof or of plaintiff's attorney. Hereof fail not.

Witness the Honorable George W. Folta, Judge of said Court, and the Seal thereof, affixed at Juneau, in said Territory, this 9th day of June, 1950.

J. W. LEIVERS,

Clerk of the District Court.

[Seal] By /s/ LOIS P. QUILICO,  
Deputy.

United States of America,  
Territory of Alaska,  
Division Number One—ss.

I hereby certify and return that I received the within and hereto Duces Tecum Subpoena at Juneau, Alaska on the 9th day of June, 1950 and that I served the same at Juneau, Alaska, on the 25th day of June, 1950 by delivering to and leaving with S. Einstoss a certified copy of the within Duces Tecum Subpoena, personally and in person, and that I did at the same time deliver to and leave with said S. Einstoss the sum of \$3.00 in cash as a witness fee.

Dated at Juneau, Alaska, June 26, 1950.

WILLIAM T. MAHONEY,  
U. S. Marshal.

By /s/ WALTER G. HELLAN,  
Deputy.

Marshal's fees .85.

[Endorsed]: Filed June 26, 1950.

In the United States District Court  
For the Territory of Alaska, Division Number One

United States of America,  
Territory of Alaska—ss.

### SUBPOENA

The President of the United States of America,

To: S. Einstoss, Greeting:

You Are Hereby Ordered to appear before the District Court of the United States, for the Territory of Alaska, at Juneau, Alaska, in said District, on Wednesday, the 20th day of September, 1950, at 10:00 o'clock A. M. of that day, to testify as a witness on behalf of the plaintiff in the case of James V. Cole vs. Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, and bring with you all books, papers and records with reference to your personal business transactions with Sam Asp and Maude Asp, individually or as co-partners doing business under their co-partnership trade name of Salt Sea Fisheries, including all fish purchase and sales slips for the year 1949, all telegrams, letters and communications, or copies thereof, passing between you and either Sam Asp personally or Maude Asp personally, or Sam Asp and Maude Asp, co-partners doing business under their co-partnership trade name of Salt Sea Fisheries, and between you and K. W. Oakson, all payroll and tax records for the year 1949, all cancelled checks

for the year 1949, all shipping receipts and copies of bills of lading, way-bills and freight bills for the year 1949, and the original and all copies of any and all agreements entered into between you individually and Sam Asp individually and Maude Asp individually and Sam Asp and Maude Asp, co-partners doing business under their co-partnership trade name of Salt Sea Fisheries, and depart not the Court without leave thereof or of plaintiff's attorney. Hereof fail not.

Witness the Honorable George W. Folta, Judge of said Court, and the Seal thereof, affixed at Juneau, in said Territory this 29th day of June, 1950.

J. W. LEIVERS,

Clerk of the District Court,

[Seal] By /s/ LOIS P. QUILICO,  
Deputy.

United States of America,  
Territory of Alaska,  
Division Number One—ss.

I hereby certify that I received the within and hereto Subpoena at Juneau, Alaska on the 29th day of June, 1950, and that I served the same at Juneau, Alaska, on the 29th day of June, 1950, by delivering to and leaving with S. Einstoss a certified copy of the within subpoena, together with a witness fee in the sum of \$3.00 personally and in person.

Dated at Juneau, Alaska, June 29, 1950.

WILLIAM T. MAHONEY,  
U. S. Marshal.

By /s/ WALTER G. HELLAN,  
Deputy.

Marshal's fees .85.

[Endorsed]: Filed July 5, 1950.

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[Title of Cause.]

### MINUTE ORDERS

Minute Order of the District Court dated November 14, 1949 as recorded on Page 319 of Journal #19.

This matter having heretofore come before the court and arguments having heard on defendant's Motion to Quash Service of Writ, the court at this time, in effect, denied the same by the following. "The Court will not decide the question of ownership on affidavits or testimony of one witness. Claimant should intervene so that all available evidence on question of ownership (of salmon) may be presented.

Minute Order of the District Court dated May 5, 1950 as recorded on Page 429 of Journal #19.

This case came before the court for hearing of arguments on plaintiff's Motion for Summary Judgment. William L. Paul, Jr., appeared for plaintiff and M. E. Monagle for defendant. After arguments



of counsel, the court denied the motion. This case having been set for trial on Thursday, May 11th, after discussion between court and counsel, it was moved up and set for trial to follow No. 6032-A which is set for May 18th.

Minute Order of the District Court dated May 18, 1950, as recorded on Page 443 of Journal #19.

This matter having been set for trial at this time M. E. Monagle was present for plaintiff and William L. Paul, Jr., was present for defendants. Attorney for plaintiff stated that one of his witnesses had not arrived and thereafter both parties stipulated that this matter be continued. The court thereupon set this matter for trial Monday, May 22nd, to follow #6222-A Panis vs. Vosotros.

Minute Order of the District Court dated May 22, 1950, as recorded on Page 448 of Journal #19.

This case having been set for this date Mr. Monagle attorney for plaintiff informed the court that the Marshal was unable to serve subpoena for a witness necessary in order to try this case. Thereupon by agreement with William L. Paul, Jr., attorney for defendants the court definitely set this case for trial at 10 A. M. June 8th.

Minute Order of the District Court dated June 9, 1950, as recorded on Page 457 of Journal #19.

At this time the Court re-set this case for trial on June 26th at 10 A.M.

Minute Order of the District Court dated June 29, 1950 as recorded on Page 466 of Journal #19.

This case having been set for trial to follow

#6290-A the parties asked that this case be postponed until September 20th, which the court allowed.

Minute Order of the District Court dated September 20, 1950, as recorded on Page 13 of Journal #20.

This case came before the court for hearing on the claim of S. Einstoss. Plaintiff was not personally present, but was represented by M. E. Monagle. Defendants were in default and were therefore not represented. The third party, S. Einstoss was present by virtue of a Subpoena Duces Tecum and was represented by William L. Paul, Jr. Mr. Monagle advised the court that the witness Einstoss was an adverse witness; witness Einstoss was duly sworn. A letter, undated, written to S. Einstoss by Sam and Maude Asp was admitted in evidence as plaintiff's Exhibit #1. Demand for the books of Einstoss was made by Mr. Monagle, but all the witness could produce was papers and reports given the said Einstoss by his bookkeeper. After discussion, the court continued the hearing on this matter over till Einstoss could appear in court with his books and his bookkeeper and the court further decreed that Einstoss would be assessed with all costs incurred by virute of the continuance.

Minute Order of the District Court dated December 29, 1950, as recorded on Page 63 of Journal #20.

Upon the calling of the trial calendar of cases for trial, the court set this case for trial on January 5, 1951 at 10 A.M.



Minute Order of the District Court dated January 5, 1951, as recorded on Page 72 of Journal #20.

This case was set for trial at this time. William L. Paul, Jr., appeared in behalf of S. Einstoss, Garnishee Defendant; M. E. Monagle was present for plaintiff. Mr. Paul moved for a continuance; Mr. Monagle objected, complaining of delay and called attention to the 100 cases of salmon under attachment and in storage with costs piling up. After discussion the court denied the motion. Mr. Paul then moved for an order directing the Clerk to deliver certain papers and records on deposit with the court so that an accounting report can be completed. After discussion this was denied and the Court ordered that Mr. Einstoss appear in court with his books of record, and with and account or someone who understands them, and he was given until January 22nd to comply, and in the meantime all costs of delay would be assessed against the garnishee defendant.

Minute Order of the District Court dated January 23, 1951, as recorded on Pages 90 and 91 of Journal #20.

This case came before the court for further hearing on its trial, the same having been continued over from September 20, 1950. William L. Paul Jr., was present for S. Einstoss, third party claimant. M. E. Monagle appeared for plaintiff. Robert L. Ramsey was called and sworn for testimony in behalf of S. Einstoss. After his testimony was completed and court and counsel had discussed the matter at length, this case was recessed till 2 P.M.

to give counsel an opportunity to agree on certain facts.

At this time with both counsel of record present, Mr. Monagle advised the Court that he had gone over the material submitted by S. Einstoss with the witness Robert L. Ramsey and that apparently the summary prepared by this witness and sought to be admitted in evidence was made up from the said material and not from the "books" submitted; he would not admit that the summary was correct, but that it was most unsatisfactory. The matter was discussed at length between court and counsel after which the court decreed that S. Einstoss had failed to prove ownership of some 86 cases of canned salmon under attachment herein.

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[Title of District Court and Cause.]

### COST BILL

Statement of disbursements claimed in the above entitled cause, viz.:

Clerk's Fees .....	\$ 15.00
Marshal's Fees .....	30.15
Trial Fee .....	6.00
Attorney's Fees .....	250.00
Disbursements Storage of fish.....	186.01
Witness Fees S. Einstoss.....	12.00
James V. Cole .....	12.00
Total.....	\$511.16

United States of America,  
Territory of Alaska,  
Division No. 1—ss.

I, M. E. Monagle, being duly sworn, say I am the Attorney for Plaintiff in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that Plaintiff is entitled to recover the same from the Defendants and Garnishee-Defendant.

/s/ M. E. MONAGLE.

Subscribed and sworn to before me this 26th day of January, 1951.

[Seal] /s/ J. W. LEIVERS,  
Clerk

Costs taxed at \$511.16 this . . . . day of January, 1951.

Receipt of Copy acknowledged.

[Endorsed]: Filed, January 26, 1951.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This matter having come regularly on for trial in open Court, without a jury, the plaintiff appearing by his attorney M. E. Monagle, and the defendants having appeared herein by their attorney William L. Paul, Jr., and the garnishee defendant ap-

pearing by his attorney William L. Paul, Jr., and it appearing to the Court that this case was filed and docketed in this Court on October 3, 1949, and thereafter a Summons was duly issued out of and under the seal of this Court, which Summons was personally served upon the defendants by the United States Marshal for the First Judicial Division of the Territory of Alaska, at Juneau, Alaska, on October 3, 1949, and within the jurisdiction of this Court, and thereafter defendants appeared herein and filed their Answer to plaintiff's Complaint, and plaintiff thereafter filed his Reply to defendant's Answer; and, that thereafter and on May 2, 1950, William L. Paul Jr., made and filed herein his Motion for permission to withdraw as attorney for defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, and thereafter and on the same day the above-entitled Court made its Order granting the Motion of William L. Paul, Jr., and permitting him to withdraw as attorney for said defendants and directed the Clerk of the above-entitled Court to notify said defendants that this case was set for trial and was to be tried on Thursday, May 4, 1950, and directing that defendants obtain another attorney to represent them if they desired to do so; and, that thereafter and on May 4, 1950, this case was reset for trial to take place on May 18, 1950; and thereafter and on May 18, 1950; this case was reset for trial on May 22, 1950; and, it appearing that thereafter and on May 22, 1950, at the request of William L. Paul, Jr., the

trial date was reset for June 8, 1950, and thereafter, and on the Motion of William L. Paul, Jr., the case was again reset for trial on June 26, 1950, and that thereafter and on June 29, 1950, the case was reset for trial on September 20, 1950; and, it further appearing that thereafter and on September 20, 1950, this case came regularly on for trial and plaintiff appeared personally and by his attorney M. E. Monagle, and the defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, failed to appear or adduce any evidence whatsoever on their behalf, and the garnishee defendant S. Einstoss appeared personally and by his attorney William L. Paul, Jr., and adduced evidence in support of his contention that he was the owner of 85 cases containing 48 one pound cans each of silver or coho salmon per case, which had been attached and seized by the United States Marshal on October 5, 1949, by virtue of a Writ of Attachment levied upon said cases of salmon in the warehouse of defendant Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, at Tenakee, Alaska, and in support of his contention that said defendants were not the owners of said salmon; and, it appearing that said S. Einstoss had failed to produce his books and records as required by the subpoena directed to him and issued out of this Court, under the seal of this Court, on June 29, 1950; thereupon, at the request of said S. Einstoss and his attorney William L. Paul, Jr., the trial was



thereupon continued over until said garnishee defendant S. Einstoss could appear and produce his books and records, which Order continuing the date of the trial to December 29, 1950, was made on the condition that S. Einstoss would pay all costs, and that all costs incurred by virtue of the continuance of the trial of this case would be assessed against said garnishee defendant S. Einstoss; and, it further appearing that the trial of this case came before the Court again on December 29, 1950, at which time plaintiff appeared personally and by his attorney M. E. Monagle, and the defendants again failed to appear or adduce any evidence in their behalf, and the garnishee defendant S. Einstoss failed to appear and adduce any evidence in his behalf, and at the request of William L. Paul, Jr., attorney for S. Einstoss, this Court again continued the trial at the request of William L. Paul, Jr., attorney for S. Einstoss, to January 22, 1951, in order to give said garnishee defendant S. Einstoss an opportunity to produce his books and records, which Order provided that all costs incurred by virtue of said continuance would be assessed against said garnishee defendant S. Einstoss; and, this case having come regularly on for trial in open Court as hereinabove specified on January 23, 1951; and, it further appearing that by virtue of a Writ of Attachment issued out of this Court the United States Marshal levied upon, seized and took into his possession on October 5, 1949, and now holds and has in his possession by virtue of and under the lien of said attachment, 100 cases of pink salmon which have

not been sold as perishable property or discharged from said attachment or the lien thereof as provided by law, or otherwise, and are now held by virtue of and under the lien of said attachment; and, the Court being now fully advised in the premises makes and enters its Findings of Fact and Conclusions of Law, as follows:

### Findings of Fact

#### I.

That the defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, are co-partners doing business under their co-partnership trade name in Tenakee, Alaska, and within the jurisdiction of this Court, and plaintiff is an individual resident of Juneau, Alaska.

#### II.

That said defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, owe plaintiff James V. Cole the sum of \$927.00 for boat charter and skid pile driver rental for the period ending November 1, 1948, which amount said defendants agreed to pay, but which has not been paid by defendants to plaintiff.

#### III.

That a Writ of Attachment was heretofore and on October 3, 1949, duly and regularly issued out of and under the seal of this Court, directing the United States Marshal to attach and safely keep

as much of the property of said defendants as might be sufficient to satisfy the plaintiff's demands and the costs and disbursements of plaintiff herein, and that by virtue of and under the authority of said Writ of Attachment the said United States Marshal for the First Judicial Division of Alaska, thereafter and on October 5, 1949, duly and regularly levied upon, attached and now holds and has in his possession by virtue of and under the lien of said attachment, one hundred cases of pink salmon which was placed in storage and is still in storage at the city dock in Juneau, Alaska, and which one hundred cases of pink salmon have not been sold as perishable property or discharged from said attachment or the lien thereof as provided by law, or otherwise, and are now held by virtue of and under the lien of said attachment pending the Judgment of this Court.

#### IV.

That a Writ of Attachment was heretofore and on October 3rd, 1949, duly and regularly issued out of and under the seal of this Court, directing the United States Marshal to attach and safely keep so much of the property of the defendants as might be sufficient to satisfy the plaintiff's demands and the costs and disbursements of plaintiff herein, and that by virtue of and under the authority of said Writ of Attachment the United States Marshal for the First Judicial Division of Alaska duly and regularly attached eighty-five cases of silver salmon containing forty-eight one pound cans per case, and thereafter and on October 14, 1949, the garnishee



defendant S. Einstoss made his claim of ownership of said eighty-five cases of silver salmon and thereafter and on October 17, 1949, made and gave the United States Marshal a written Undertaking, executed by K. O. Oakson, agent for said claimant S. Einstoss, as principal, and Wallis S. George and Mrs. G. R. Kennedy as sureties, wherein and whereby they covenanted and agreed to undertake in the sum of \$1,530.00, being the amount for that purpose fixed by the custodian as the value of said attached salmon, at Tenakee, Alaska, and undertook and agreed that they would pay any Judgment against the said garnishee defendant S. Einstoss by redelivering said attached salmon, or the value thereof, to the said United States Marshal as an executive officer of this Court, and thereupon the United States Marshal surrendered said eighty-five cases of salmon to said S. Einstoss; and, that said eighty-five cases of forty-eight one pound cans to the case of silver salmon has not been sold as perishable property or discharged from said attachment or the lien thereof as provided by law, or otherwise.

#### V.

That plaintiff James V. Cole, as an attachment creditor, is a purchaser in good faith and for a valuable consideration of the property so attached in this case by the United States Marshal as hereinabove stated in these Findings, and the garnishee defendant S. Einstross has failed to prove ownership, and is hereby found not to be the owner of said eighty-five cases of forty-eight one pound cans per case of silver salmon claimed by him.

## Conclusions of Law

## I.

That James V. Cole, the plaintiff herein, is entitled to Judgment against the defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, for the sum of \$927.00, together with interest thereon at the rate of 6% per annum from November 1, 1948, amounting to \$124.00, making a total Judgment in favor of plaintiff and against defendants in the sum of \$1,051.00, together with interest thereon from the date hereof until paid at the rate of 6% per annum, together with plaintiff's costs and disbursements herein incurred, including the sum of \$250.00 as and for attorney's fees.

## II.

That the personal property, consisting of one hundred cases of salmon containing forty-eight one-pound cans of salmon in each case, and said eighty-five cases of silver salmon containing forty-eight one-pound cans of salmon in each case, levied upon and now held by virtue of a Writ of Attachment in the hands of the United States Marshall as hereinabove described and specified, should not be sold as perishable property or discharged from the attachment as provided by law, but plaintiff is entitled to have an Order entered herein ordering and adjudging that all of the aforesaid attached property be sold to satisfy plaintiff's said Judgment and to have execution issue herein for the satisfaction of said Judgment, and to have the

United States Marshal apply the said property so attached by him, and the proceeds derived therefrom by the sale thereof under execution, to satisfy plaintiff's said Judgment, including costs of sale, accruing costs, and costs and attorney's fees, and to have execution for any deficiency which may remain, but the excess, if any, should upon demand be paid to the defendants.

### III.

That plaintiff should have Judgment against the garnishee defendant S. Einstoss and Wallis S. George as surety on his Undertaking heretofore made and filed herein and against Mrs. G. R. Kennedy as surety on his bond and Undertaking heretofore made and filed herein; that said S. Einstoss immediately and forthwith redeliver said eighty-five cases of silver salmon containing forty-eight one-pound cans per case, to the United States Marshal or pay the sum of \$1,530.00, which is the value of those certain eighty-five cases of forty-eight one-pound cans each of silver salmon heretofore attached by the United States Marshal as in these Findings and Conclusions above specified, which salmon was surrendered to the defendant S. Einstoss on his claim of ownership, upon his making and filing his said Undertaking for delivery with Wallis S. George and Mrs. G. R. Kennedy as sureties on said Undertaking for delivery, or so much of said \$1,530.00 as may be necessary to satisfy plaintiff's Judgment, together with principal and interest, costs and accruing costs since September 20, 1950, and attorney's fees herein.

## IV.

That a Judgment and Decree should be made and entered upon these Findings of Fact and Conclusions of Law.

Done in open Court at Juneau, Alaska, this 26th day of January, 1951.

/s/ GEORGE W. FOLTA,  
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1951.

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In the District Court for the Territory of Alaska,  
Division Number One, at Juneau  
Civil Action—File No. 6184-A

JAMES V. COLE,

Plaintiff,

vs.

SAM ASP and MAUDE ASP, Co-partners, Doing  
Business Under Their Co-partnership Trade  
Name of SALT SEA FISHERIES,  
Defendants,

and

S. EINSTOSS,

Garnishee Defendant.

JUDGMENT AND DECREE

This matter having come regularly on for trial in open Court, without a jury, on January 23,

1951, the plaintiff appearing by his attorney, M. E. Monagle, Esquire, and the defendants having appeared herein by their attorney, William L. Paul, Jr., Esquire, and the garnishee defendant appearing by his attorney, William L. Paul, Jr., Esquire, and it appearing to the Court that this case was filed and docketed in this Court on October 3, 1949, and thereafter a Summons was duly issued out of and under the seal of this Court, which Summons was personally served upon the defendants by the United States Marshal for the First Judicial Division of the Territory of Alaska, at Juneau, Alaska, on October 3, 1949, and within the jurisdiction of this Court, and thereafter defendants appeared herein and filed their Answer to plaintiff's Complaint, and plaintiff thereafter filed his Reply to defendants' Answer; and, that thereafter and on May 2, 1950, William L. Paul, Jr., made and filed herein his Motion for permission to withdraw as attorney for defendants Sam Asp and Maude Asp, co-partners doing business under their co-partnership trade name of Salt Sea Fisheries, and thereafter and on the same day the above-entitled Court made its Order granting the Motion of William L. Paul, Jr., and permitting him to withdraw as attorney for said defendants and directed the Clerk of the above-entitled Court to notify said defendants that this case was set for trial and was to be tried on Thursday, May 4, 1940, and directing that defendants obtain another attorney to represent them if they desired to do so; and, that thereafter and on May 4, 1950, this case was reset for trial to take



place on May 18, 1950; and thereafter and on May 18, 1950, this case was reset for trial on May 22, 1950; and, it appearing that thereafter and on May 22, 1950, at the request of William L. Paul, Jr., the trial date was reset for June 8, 1950, and thereafter, and on the Motion of William L. Paul, Jr., the case was again reset for trial on June 26, 1950, and that thereafter and on June 29, 1950, the case was reset for trial on September 20, 1950; and, it further appearing that thereafter and on September 20, 1950, this case came regularly on for trial and plaintiff appeared personally and by his attorney, M. E. Monagle, and the defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, failed to appear or aduce any evidence whatsoever on their behalf, and the garnishee defendant S. Einstoss appeared personally and by his attorney, William L. Paul, Jr., and adduced evidence in support of his contention that he was the owner of eighty-five cases containing forty-eight one-pound cans each of silver or coho salmon per case, which had been attached and seized by the United States Marshal on October 5, 1949, by virtue of a Writ of Attachment levied upon said cases of salmon in the warehouse of defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, at Tenakee, Alaska, and in support of his contention that said defendants were not the owners of said salmon; and, it appearing that said S. Einstoss had failed to produce his books and records as required by the

subpoena directed to him and issued out of this Court, under the seal of this Court, on June 29, 1950; thereupon, at the request of said S. Einstoss and his attorney, William L. Paul, Jr., the trial was thereupon continued over until said garnishee defendant S. Einstoss could appear and produce his books and records, which Order continuing the date of the trial to December 29, 1950, was made on the condition that S. Einstoss would pay all costs, and that all costs incurred by virtue of the continuance of the trial of this case would be assessed against said garnishee defendant S. Einstoss: and, it further appearing that the trial of this case came before the Court against on December 29, 1950, at which time plaintiff appeared personally and by his attorney, M. E. Monagle, and the defendants again failed to appear or adduce any evidence in their behalf, and the garnishee defendant S. Einstoss failed to appear and adduce any evidence in his behalf, and at the request of William L. Paul, Jr., attorney for S. Einstoss, this Court again continued the trial at the request of William L. Paul, Jr., attorney for S. Einstoss, to January 23, 1951, in order to give said garnishee defendant S. Einstoss an opportunity to produce his books and records, which Order provided that all costs incurred by virtue of said continuance would be assessed against said garnishee defendant S. Einstoss: and, this case having come regularly on for trial in open Court as hereinabove specified on January 23, 1951, and it appearing that by virtue of a Writ of Attachment issued out of and under the seal of this Court



the United States Marshal on October 5, 1949, duly and regularly levied upon, seized, attached, and now holds and has in his possession by virtue of and under the lien of said attachment, one hundred cases of pink salmon which has not been sold as perishable property or discharged from said attachment or the lien thereof, as provided by law, or otherwise, but are now held by virtue of and under the lien of said attachment; and, the Court being now fully advised in the premises, and having heretofore duly made and entered its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that James V. Cole, plaintiff herein, have Judgement against the defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries, for the sum of \$927.00, together with interest thereon at the rate of six per cent per annum from November 1, 1948, amounting to \$124.00, making a total Judgment in favor of plaintiff and against defendants in the sum of \$1,051.00, together with interest thereon from the date hereof until paid at the rate of six per cent per annum, together with plaintiff's costs and disbursements herein incurred, including the sum of \$250.00 as and for attorney's fees; and, it is hereby further ordered, adjudged and decreed that the personal property consisting of one hundred cases of salmon containing forty-eight one-pound cans of salmon in each case and of said eighty-five cases of silver salmon containing forty-eight one-pound cans of salmon in each case,

heretofore duly levied upon and now held by virtue of a Writ of Attachment in the hands of the United States Marshal, which has not been sold as perishable property or discharged from the attachment as provided by law, should not be sold as perishable property or discharged from said attachment as provided by law, but that all of said above described cases of salmon so held by the United States Marshal by virtue of and under the lien of said attachment, be sold to satisfy plaintiff's said Judgment, and that execution issue on this Judgment and that upon said execution the United States Marshal sell said attached personal property and apply it, or the proceeds derived therefrom, to satisfy plaintiff's said Judgment, including costs of sale, accruing costs, and costs and attorney's fees, and that execution issue for any deficiency which may remain, but that the excess, if any, be delivered by the United States Marshal, upon demand, to the defendants Sam Asp and Maude Asp, co-partners, doing business under their co-partnership trade name of Salt Sea Fisheries; and, it is hereby further ordered, adjudged and decreed that the plaintiff James V. Cole have Judgment against the garnishee defendant S. Einstoss and Wallis S. George as surety on his Undertaking heretofore made and filed herein and against Mrs. G. R. Kennedy as surety on her bond and Undertaking heretofore made and filed herein; that said garnishee defendant S. Einstoss pay the Judgment of James V. Cole against the defendants herein by redelivering said eighty-five cases of attached silver salmon, or that said S. Ein-

stoss and the sureties on his bond, Wallis S. George and Mrs. G. R. Kennedy, pay the sum of \$1,530.00, which is the value of those certain eighty-five cases of forty-eight one-pound cans in each case of silver salmon heretofore attached by the United States Marshal and thereafter delivered to the garnishee defendant S. Einstoss on his claim of ownership, upon his making and filing his said Undertaking for delivery with said Wallis S. George and Mrs. G. R. Kennedy as sureties on said Undertaking for delivery, or so much of said \$1,530.00 as may be necessary to fully satisfy plaintiff's Judgment, together with principal and interests, costs and accruing costs since September 20, 1950, and attorney's fees herein.

Done in open Court at Juneau, Alaska, this 26th day of January, 1951.

/s/ GEORGE W. FOLTA,  
District Judge.

Entered Court Journal No. 20, pages 95-96-97.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1951.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice of appeal is hereby given by S. Einstoss, garnishee defendant above named, that he appeals to the Court of Appeals for the Ninth Circuit from

the judgment of the above-entitled Court of January 26, 1951, in this cause.

Appellant requests that supersedeas bond be fixed at \$2,000.00.

/s/ WILLIAM L. PAUL, JR.,  
Attorney for  
Garnishee-Defendant.

[Endorsed]: Filed February 24, 1951.

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[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON  
BY APPELLANT

1. There is no evidence at all that the property attached by the Marshal at Tenakee, Alaska, and claimed by garnishee-defendant belongs to any person other than the garnishee-defendant.

2. All the evidence shows that said property has always belonged to garnishee-defendant.

3. The Marshal testified without objection that at the time he made the levy on the property at Tenakee, Alaska, he was told by defendant Maude Asp that the property was owned by the garnishee-defendant; and the Court erred in refusing to consider this evidence.

March 7, 1951.

/s/ WILLIAM L. PAUL, JR.,  
Appellant's Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1951.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF  
RECORD TO BE PRINTED

To the Clerk of the Above-Entitled Court:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit at San Francisco, with reference to the notice of appeal heretofore filed herein, transcript of the record in this cause, transmitted and prepared as required by law and the rules of court, and to include in said transcript the following:

1. Complaint filed October 3, 1949.
2. Writ of attachment of October 3, 1949, with return.
3. Motion to quash service of writ filed October 22, 1949.
4. Affidavit received in evidence November 10, 1949.
5. Affidavit with exhibits attached filed April 19, 1950.
6. Motion for summary judgment filed April 19, 1950.
7. Affidavit filed May 3, 1950.
8. Cost bill filed January 26, 1951.
9. Findings of fact and conclusions of law dated January 26, 1951.
10. Judgment dated January 26, 1951.
11. Notice of appeal filed February 24, 1951.

12. Statement of points on which appellant relies on appeal.
13. This designation.
14. Transcript of testimony.

/s/ WILLIAM L. PAUL, JR.,  
Appellant's Attorney.

[Endorsed]: Filed February 26, 1951.

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[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

The plaintiff, James V. Cole, respectfully suggests and requests that in addition to the portions set forth in plaintiff-appellant's "Designation of Contents of Record on Appeal," the following hereinafter mentioned and designated portions of the record, proceedings, and evidence submitted upon the hearing of said cause, to be contained in the record on appeal, and requests the Clerk of the above-entitled Court to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit Court, as part of the transcript of record, the following:

1. Affidavit of M. E. Monagle filed May 3, 1950, in opposition to S. Einstoss' Motion for Summary Judgment.
2. Motion of James V. Cole filed May 3, 1950, for extension of time for hearing of Motion for Summary Judgment.



3. Subpoena Duces Tecum of June 9, 1950, directed to S. Einstoss, together with Marshal's Return thereon.

4. Subpoena Duces Tecum of June 29, 1950, directed to S. Einstoss, with Marshal's Return thereon.

5. Minute Order of the District Court dated November 14, 1949.

6. Minute Order of the District Court dated May 5, 1950.

7. Minute Order of the District Court dated May 18, 1950.

8. Minute Order of the District Court dated May 22, 1950.

9. Minute Order of the District Court dated June 9, 1950.

10. Minute Order of the District Court dated June 29, 1950.

11. Minute Order of the District Court dated September 20, 1950.

12. Minute Order of the District Court dated December 29, 1950.

13. Minute Order of the District Court dated January 5, 1951.

14. Minute Order of the District Court dated January 23, 1951.

/s/ M. E. MONAGLE,  
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 7, 1951.



In the District Court for the Territory of Alaska,  
Division Number One, at Juneau

No. 6184-A

JAMES V. COLE,

Plaintiff,

vs.

SAM ASP and MAUDE ASP, Co-partners, Doing  
Business Under Their Co-partnership Trade  
Name of SALT SEA FISHERIES,

Defendants,

and

S. EINSTOSS,

Garnishee-Defendant.

REPORTER'S TRANSCRIPT OF  
TESTIMONY

Be It Remembered, that on the 20th day of Sep-  
tember, 1950, at 10:00 o'clock a.m., at Juneau,  
Alaska, the above-entitled cause came on for hear-  
ing, the Honorable George W. Folta, United States  
District Judge, presiding; the plaintiff appearing  
by M. E. Monagle, his attorney; the garnishee-  
defendant appearing in person and by William L.  
Paul, Jr., his attorney; and, respective counsel hav-  
ing made opening statements to the Court, the fol-  
lowing testimony was adduced: [1\*]

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\* Page numbering appearing at foot of page of original Reporter's  
Transcript of Record.

## SIGMUND EINSTOSS

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Monagle:

Q. Will you state your name?

A. Sigmund Einstoss.

Q. Mr. Einstoss, do you know Sam Asp?

A. Yes, sir.

Q. Do you know Maude Asp?           A. Yes.

Q. And how long have you been doing business, if any, with Sam Asp and Maude Asp, doing business as Salt Sea Fisheries at Tenakee, Alaska?

A. They packed salmon for me once several years ago. I don't remember the exact year, and this is the second time. I mean 1949 was the second time they packed salmon for me.

Q. They packed salmon for you in 1949?

A. Yes.

Q. And you say they packed salmon for you prior to that?           A. Yes.

Q. What year?

A. I don't remember the exact year.

Q. Well, do your books show it?

A. The books would show it; yes.

Q. Let's see your books. [2]

A. Not these books wouldn't show it. It has nothing to do with this; this is for 1949.

Q. You have a separate set of books for each year?

(Testimony of Sigmund Einstoss.)

A. I have books in Seattle that would show.

Q. You were subpoenaed to bring books of all your dealings with Sam Asp.

A. I understood you meant 1949. I don't see it has anything to do with it for prior years, five or six years ago.

Mr. Paul: I think counsel should show some materiality for 1945 or 1946. It wouldn't seem to have anything to do with this.

The Court: Am I to understand that the record for 1949 also includes the records for previous years?

A. No, sir.

Q. What kind of books do you keep?

A. I am not a bookkeeper. I really don't know.

Q. I didn't ask you if you kept books. I asked you if you had books, Mr. Einstoss. What kind of books have you? What kind of books does your bookkeeper keep for you?

A. I don't know.

Q. You didn't see them?

A. I did see them, but I don't know anything about books.

Q. Well, what did you put in the books that you do have?

A. I never put in anything myself.

Q. Well, what does your bookkeeper put in them? [3]

A. I don't know; everything pertaining to the business, I presume.

Q. When you say "everything pertaining to the

(Testimony of Sigmund Einstoss.)

business," what do you mean? How much fish were bought and how much you paid for them; is that it?

A. All the transactions, buying, selling, and expenses in connection, and so on and so forth.

Q. And who the fish were bought from?

A. Yes.

Q. And who bought them?

A. I suppose so.

Q. And what commission was paid for buying them? A. Yes.

Q. Does that include all kinds of fish that you bought during the year? A. What year?

Q. Any year.

A. I suppose that is the way they keep them.

Q. You say you had an agreement with Sam Asp and Maude Asp to pack fish for you during the year 1949? A. That is right.

Q. Now, when was this agreement made between you and Mr. and Mrs. Asp?

A. It was sometime prior to the commencement of the season. She came down to Ketchikan, and we made an agreement. [4]

Q. And you say she came down—who came down? A. Mrs. Asp.

Q. Were all your negotiations for this contract with Mrs. Asp?

A. No. Sam Asp was in the office in Seattle first.

Q. When was that?

A. Sometime in the spring of 1949; and we didn't come to an agreement. And finally she come down to Ketchikan, and we made an agreement.

(Testimony of Sigmund Einstoss.)

Q. Now, what were the contents of the agreement which you made with her?

Mr. Paul: Let's produce the agreement, your Honor.

Mr. Monagle: I have a right to have him testify what the contents were of any agreement he made with her or Sam Asp.

Mr. Paul: If he is examining as to credibility; yes.

Mr. Monagle: In his affidavit he says it is partly in writing and partly oral. It is his own affidavit. He swore to it.

The Court: If that is the situation, then of course he can answer the question.

Mr. Monagle: It is in the affidavit on file, may it please the Court, his sworn affidavit.

The Court: It isn't challenged, I guess.

A. We agreed they would buy salmon for me and pack them—that [5] is, can them—and I am to pay them, and they are to furnish labor, cans, cartons, and I am to pay them \$3.50 a case, and I am to advance the money for fish and for the cans and cartons and also pay them some money on account during the canning season, and I am to withhold, I believe, either fifty cents or a dollar a case until the fish are examined by the National Cannery.

The Court: Did you say fifty cents?

A. I believe, fifty cents per case until the fish are examined; either a dollar or fifty cents. We have the contract here. It speaks for itself.

(Testimony of Sigmund Einstoss.)

The Court: I understand you to say you agreed to pay them fifty cents per case until the fish were accepted?

A. No. I agreed to pay them whatever they need for payroll, and not to exceed the full amount, and also advance the money for the cans and for the cartons, and also guarantee the oil for them, and all this is to be deducted from the \$3.50, but before final settlement I should withhold, I believe, fifty cents a case until the fish are examined by the National Cannery, until found to be suitable for human consumption, and, if not found suitable for human consumption, they would have to be reconditioned; they are to stand all the expenses and they are to pay for those fish that are condemned by the National Cannery, if any.

Q. Now, as I understand your testimony, they were to furnish [6] all the labor and cans and boxes, or the cartons that the fish was packed in; is that right?      A. That is right.

Q. And then they were supposed to pack fish?

A. Yes.

Q. Now, who was supposed to furnish the fish?

A. I am supposed to furnish the fish, furnish the money to buy the fish with.

Q. What do you mean, furnish fish or furnish money to buy fish?

A. I didn't have no fish. I had to furnish money to buy fish with.

Q. You furnished money to buy fish with?

A. So I was to furnish the fish, naturally.



(Testimony of Sigmund Einstoss.)

Q. Who was to pay for the labor, cans, cartons, salt, and oil for running the cannery, and other items?      A. Sam Asp and Maude Asp.

Q. They were to pay for that?      A. Yes.

Q. Now, what is the cost of a carton of cans, talls?

A. A carton of cans is approximately a dollar and a half per case plus freight.

Q. And how much is freight on a case of cans to Tenakee?

A. I don't know. It came about a dollar and a half. I think that included the freight. The cans, the cartons and the [7] freight, I believe it came to about a dollar and a half.

Q. Now, was there any other agreement between you and Sam Asp or Maude Asp with reference to the canning of these fish?

A. No. The agreement was covered for the year 1949.

Q. And now, what correspondence passed between you and either Sam Asp or Maude Asp with reference to making this contract?

A. I don't think I have had any correspondence with them, except that he was in the office once, and then I didn't pay much attention to it, and finally she came down to Ketchikan, and we then agreed and signed an agreement.

Q. Well, now, in an affidavit that you swore to on April 11, 1950, you state that "written portions of said contract evidenced in letters between affiant and defendant, some of which letters are attached



(Testimony of Sigmund Einstoss.)

and made a part hereof." One letter was attached. Where are the other letters?

A. I don't remember exactly. The lawyer made out the affidavit, and I signed it. It speaks for itself.

Q. I know it speaks for itself, but I want to know where the letters are that it speaks of.

A. I don't remember now if we had any letters or not.

Mr. Paul: Your Honor, we are responding to the subpoena that required us to produce all documents, correspondence, affecting the relation. Everything is here if counsel wants to look over it, and to ask the witness for intimate [8] knowledge of everything in this file is going too far. If there are extra letters, in view of his statement that he doesn't know, we will let counsel look over them.

A. I couldn't remember right now.

Mr. Monagle: I don't have to assume that he brought all his letters. He swears that he has letters, and I am just asking where they are.

The Court: So long as the examination doesn't relate to the contents of any particular letter, I think it is proper as presently conducted. Objection overruled.

Q. Where are those letters? Do you have them with you, Mr. Einstoss?

A. If there is any letters, they are all in the files.

Q. Well, get them out, please, if you will.

Mr. Paul: Start looking, Sig.

A. What is that?

(Testimony of Sigmund Einstoss.)

Mr. Paul: Start looking.

Q. I want all of them.

Mr. Paul: Find all the letters; of any date.

Q. Now when was this undated letter, or appears to be a letter, written to S. Einstoss at Ketchikan and purportedly signed by Sam Asp and Maude Asp, when was that letter——

A. That was just a few days before the season commenced; it was made in my office by me and her.

Q. That was made in your office by you and Mrs. Asp? [9]           A. Yes.

Q. And where was that made?

A. In Ketchikan.

Q. And now, "a few days before the season commenced"; when would that be?

A. I don't know the exact date the season commenced in 1949. I think it was the same time as this year, I believe. It was some time in August.

Q. Sometime in August?

A. I don't know that.

Q. Who typed that letter?

A. She typed it.

Q. Where?           A. In my office.

Q. In your office. And how many copies of that were made?

A. I don't know. I think there was a copy.

Q. When those copies were made, or that copy if there was only one, what became of it? Didn't she give it to you?           A. A copy?

(Testimony of Sigmund Einstoss.)

Q. Yes. Has that copy been in your file ever since it was made?

A. Yes. It was in my files.

Q. At all times? A. Yes.

Q. Never been out of your files? [10]

A. No.

Q. I want to know how Sam Asp's name got on it, then. He wasn't in Ketchikan, was he?

A. I think I gave it to my man in charge, and he had Sam Asp sign it and send it back.

Q. Who was your man in charge?

A. A young man; he was a medical student; his name was Marvin Rubinstein.

Q. Marvin Rubinstein. And what did a man by the name of Oakson do?

A. He was in the fall of the year; Oakson was there in the fall of the year.

Q. Now, what do you mean by "fall of the year"?

A. The second season. That has nothing to do with this season.

Q. And Rubinstein was there the first season?

A. Yes.

Q. Now, you claim that Rubinstein took that agreement with him to Tenakee?

A. I gave him, or mailed it to him and told him to see that Sam Asp signed it and send it back to me.

Q. Now, have you any explanation of why there is no date on that?

A. Simply a mistake, a lot of people in the office,

(Testimony of Sigmund Einstoss.)

simply overlooked, no intention; there should be a date.

The Court: You are speaking of the [11] season—

A. The first, the summer season.

Mr. Monagle: We will offer that.

The Court: It may be admitted and marked Plaintiff's Exhibit No. 1.

Clerk of Court: The exhibit will be so marked.

Q. Now, what other correspondence passed between you and Mr. or Mrs. Asp during the year 1949?

A. That is all I could find. I gave you those two letters right now.

Q. Do you know of any other, besides these two letters?

A. Not this minute. I told my office to get all the correspondence and records in connection with the Tenakee 1949 operations and send it to me here, and I got it here two days ago.

Q. The only letter here with reference to any salmon that was canned is the letter of October 16, 1949, from W. K. Oakson, covering a shipment of 565 cases of salmon. Now, do you mean to tell us that was all the salmon that was shipped from there? A. I didn't say that.

Q. I want to know where the other reports are, the other letters about shipment of fish.

A. There are some bills of lading.

Q. Well, I want to ask you this. Isn't it a fact you got regular reports from Tenakee all the time

(Testimony of Sigmund Einstoss.)

as to what fish [12] was being packed and what was being done?

A. I cover several stations and I never keep records. I don't know what we have and haven't. This young man was not experienced. He done something that he shouldn't have done. And the only reason I sent him down was I know him to be honest, and I expected him to keep records, and what correspondence or records we have I don't know exactly except that I told my office to airmail all the records we have in connection with the 1949 Tenakee operation, and I received it here and I gave it to you.

Mr. Paul: May I suggest a method of shortening this? In order to assist counsel perhaps in a more detailed examination of our records and save the Court's time, the witness can identify all the records. The examination will show there were written reports, and counsel can get all sorts of information.

The Court: That may be, but counsel can't be shut off from examination of what he knows. It is presumed that he is the head of the business and how it is conducted and probably reviews the records at some time.

Mr. Paul: But essentially that examination, your Honor, is to test the credibility of the witness and the sufficiency of the records.

The Court: I thought that was what he was doing.

(Testimony of Sigmund Einstoss.)

Mr. Paul: I thought he was trying to find out the [13] number of cases.

The Court: The Court is not disposed at any time to tell counsel how to conduct his examination.

Mr. Monagle: I am questioning the veracity of the statements and when they were made, is all. I don't believe they were made at the time at all; I don't mind telling you.

The Court: You may proceed.

Q. Now, was there any other letters besides Plaintiff's Exhibit 1 here that passed between you and Sam Asp or Maude Asp with reference to them packing fish for you during the year 1949?

A. If there was, I don't know off hand at this moment.

Q. Well, you say there is or isn't?

A. There may be. Maybe if I asked them to search for more.

Q. Where would they search for more?

A. In Seattle.

Q. You were required to bring everything.

A. I told them to get all the records in connection with the operation of 1949 with Sam Asp in our possession. I presume that is what they gave me.

Q. Now, do you know how many cases of salmon were packed by the Salt Sea Fisheries, by Sam Asp and Maude Asp, during the year 1949?

A. I know if I look at the records, yes.

Q. Well, look at the records and tell me. You go ahead and [14] take a look.



(Testimony of Sigmund Einstoss.)

(Witness stepped down to his counsel's table.)

Mr. Paul: 6958, all species, first and second season.

(Witness resumed the stand.)

A. 6958 during the year of 1949 according to the records we have got here.

Q. According to your records there were 6958 cases of fish packed, is that right, during the 1949 season? A. Yes.

Q. Is this a true and correct record of what your books show with reference to the fish that was packed for you by Mr. Asp and Mrs. Asp?

A. This is the true records sent to me by my Seattle office.

Q. I don't see any place where is says 6958 cases. Is that supposed to be your total of the cases packed? You have to testify. I want you to testify to these facts.

A. Is it there, or did you add them up?

Mr. Paul: I just took the total. That is what counsel asked for.

A. Do you want me to testify in detail?

Q. I want to know how many cases of all kinds of fish were packed by Sam Asp and Maude Asp at Tenakee the season of 1949?

A. As far as I know, I can tell you again and again the same story, no other story. I have no reason to make any different statement than I made, that I keep no books; I [15] know nothing about



(Testimony of Sigmund Einstoss.)

records. I asked my office to send down all the records, and this is what they show, and that is all I can tell you.

The Court: Mr. Einstoss, the thing I don't understand is this. You say you don't keep any books. Of course you do like any other person that runs a business, but don't you keep track of the books to see that they are correct? Anybody can run off with your business.

A. I have an accountant come in and check it up, but I don't personally know anything about books. I have two years of public school.

The Court: Who furnishes the material that goes into the books that makes the records so that an accountant—are you at the mercy of an accountant, whatever he tells you?

A. Yes, I am at the mercy of an accountant. A fellow got away with thirty thousand dollars from me last year. When I found out, it was too late.

The Court: Who is it that furnishes the figures and information that goes into the books and records?

A. I usually tell the bookkeepers what is what.

The Court: Then you give them the information before they put it down? A. Yes.

The Court: Then why don't you remember it?

A. Do you expect me to remember all year the details when I [16] am so busy between here and New York?

The Court: You might not remember all the details, but from what you tell the counsel here,

(Testimony of Sigmund Einstoss.)

you don't remember any. Now, you must remember—if you give them the information to enter in the records, you would certainly have some recollection of some of the transactions, wouldn't you?

A. Not of the exact amounts. Of that I have no recollection.

The Court: Have you sufficient recollection so that when you do look over the records you can tell whether they are correct or not?

A. I want to tell the truth. I don't know because—I will tell you why, your Honor—because Sam Asp, I found out later that he spoiled some of the fish, and I have several thousand dollars coming from him and I know he didn't sell them and didn't make any difference whether he did or whether he didn't. I operate six stations in Southeastern Alaska plus some place else and I can't remember everything.

The Court: Well, do you have any way of telling whether the information that you give your bookkeeper to enter is ever included or not? How do you know that your bookkeeper puts down what you tell him or her?

A. That is all up to the accountant.

The Court: But the accountant knows nothing except what he finds on the books. [17]

A. They give me statements from time to time, and I look it over then.

The Court: Who gives you the statement?

A. The accountant.

The Court: Well but what I am trying to find

(Testimony of Sigmund Einstfoss.)

out, are you and the accountant at the mercy of the bookkeeper? Suppose the bookkeeper happens to be dishonest and, instead of putting down the information or figures that you give her or him, he doesn't do it, then how can you check on that?

A. Maybe bad business in that respect. See, I am away several months and——

The Court: I just want to understand how you keep your records; that is all.

A. I don't know nothing about books, your Honor. I have no reason but to tell the truth.

The Court: Proceed.

Q. Well, I want to know whether or not Sam Asp and Maude Asp packed five hundred or six hundred or six thousand cases.

A. According to my records it shows 6,958 cases.

Q. Cases? A. Yes.

Q. In your affidavit you filed in this court previously, which you made on April 11, 1950, of this year, you filed a statement here which purports to show the amount of cash advanced to Sam Asp. Now, it shows a total of amount [18] advanced, and then there is a figure under it. Now, is that supposed to be the difference between what you paid out and what you got back, or what is it supposed to be?

A. It shows I paid him \$8,848.00, and then it shows something—\$7,897.96. What that is supposed to be, I don't know. I sent them the statements, whatever the bookkeeper made.

(Testimony of Sigmund Einstoss.)

Q. You swore to it. You know what you are swearing to, don't you?

A. The account is correct, given by me to the bookkeeper, and I attached it to the affidavit.

Q. You don't know if it is true or not?

A. It must be true if the bookkeeper gave it to me.

The Court: How long has this bookkeeper been in your employ?

A. This man?

The Court: Yes.

A. I think he started this spring, sometime.

The Court: How many bookkeepers do you have?

A. Three.

The Court: How long have the other two been in your employ?

A. One is only about four or five months, and the other about a year. I had a bookkeeper and I found out he embezzled about thirty thousand dollars.

The Court: Over what period of time? [19]

A. About a year and a half or two, something like that.

The Court: Was he the only bookkeeper?

A. He was the head bookkeeper in charge.

The Court: And it is because of that that you got all new bookkeepers; is that it?

A. One was there before. I fired the bookkeeper and the accountant.

The Court: You mean even the accountant—

(Testimony of Sigmund Einstoss.)

A. I blamed it on the accountant. He sent in another man who didn't check right.

The Court: The accountant had to take the records as presented to him, didn't he? How could he determine there was stealing if it was covered up?

A. Well, he makes a check payable to the bank and gets another check and cashes it. The accountant should know what the check covered.

The Court: How did you find out about that?

A. I didn't find it. When I was there, he deposited the check for his own account. Somehow he slipped up and left the slip for the same amount he gave a check for.

The Court: Then you don't really know how your books are kept; anybody can get away with anything; is that it?

A. It would seem so. I am honest and I figure the other fellow is, but it was the other way.

Q. Then you don't know whether these are true or not if you [20] had dishonest bookkeepers? You don't know if your books are right or not?

A. I believe this is correct. I couldn't explain anything on the books.

Q. If what you testified to here is correct, where is the rest of the money that you owe Sam Asp? If he canned 6,958 cases of fish for you, and you got it, as you testified, at \$3.50 a case, it is certainly more than \$8,000.00.

A. I paid for the cans.

Q. How much?

A. About a dollar and a half a case, and I, then

(Testimony of Sigmund Einstoss.)

I paid for reconditioning the salmon, \$2.00 a case—how many was that?

Mr. Paul: You are testifying.

Q. 6,958.

A. And I dumped some of the salmon. It was condemned by the National Cannery.

Q. According to this record here that you have just testified to, which is designated "Summary of fish received at Tenakee during 1949," you have got here "Reconditioned, \$265.40." A. 265 cases.

Q. One part of this lot, \$123.20 covers loss and reconditioning; that is a total of about four hundred dollars there? A. Yes. [21]

Q. Was the bookkeeper wrong on that again?

A. No. We got several others.

Q. How many sets of books do you keep?

A. We have the records right here.

Q. You said that was your record.

Mr. Paul: No, no, counsel; don't put words in the witness' mouth. You haven't asked for all the books.

Mr. Monagle: I haven't asked for a book.

Mr. Paul: Don't try to get all the books out of that little sheet of paper in his hand.

Mr. Monagle: I am going to ask for the books when I get ready.

Mr. Paul: Don't trap the witness.

Mr. Monagle: I object to his attorney testifying for him all the time.

The Court: Well, remarks, of course, of that kind should not be made, and counsel ought to ad-



(Testimony of Sigmund Einstoss.)

dress themselves to the Court, also. Now, this statement that is attached to Exhibit No. 1, that he has been questioning you about, does that show all the money that you advanced?

A. For the spring operation; yes.

The Court: Why hasn't it got the item for cans then?

A. She came down to Ketchikan. We made it up then and showed it to her, and she O.K.'d it, the cash she received.

The Court: But you say you paid for the cans. [22]

A. I did.

The Court: Why isn't it on here?

A. I showed her what cash she received.

The Court: You mean it is included in the item "cash"?

A. No.

The Court: Is it shown in any of those items?

A. No.

The Court: What was the purpose of that statement?

A. She come down and she knows she got no money coming, and I showed her what she received in cash, and she had no money coming. She knew I shipped the cans.

The Court: What isn't clear to me is, if you put down the cash in advance and also the money that you spent on various things here—there is a lot of items—why didn't you put the cans down?

A. At that particular time we figured out the

(Testimony of Sigmund Einstoss.)

amount of cans packed, and the amount of cash advanced, plus the cans, was more than she had coming, and there was an oil bill to be paid that I guaranteed for the season for \$508.00 not included in there, and she was not supposed to get any final statement until the salmon are examined.

The Court: Then what was the purpose of this statement?

A. To show her how much cash she received. She figured [23] approximately two dollars a case she had coming if she——

The Court: Now, when you have an item here “wharfage and freight on salt,” she didn’t get that, did she?

A. May I see that? My man paid it in her cannery. I got it from him, and she come down and thought she had more money coming, and I showed her she was overpaid.

The Court: Was that statement intended to show how much money you were out at the time the statement was prepared?

A. How much cash she received.

The Court: And how much money you spent?

A. Yes; cash.

The Court: And why didn’t you include the cans?

A. She knew about that.

The Court: She must have known about some of these other items too, then.

A. I had better than five thousand cases left at the end of the season. I didn’t pick them up.

(Testimony of Sigmund Einstoss.)

The Court: Did you leave out anything in addition to the item of cans?

A. Except the oil bill; I didn't have the bill then from the Union Oil when she came down to Ketchikan. We figured the cans approximately a dollar and a half, and \$2.50, she didn't have that much coming at the time.

Q. Do I understand you to testify now that at the end of the [24] season you had five thousand cases of cans at Tenakee? A. I did.

Q. Is that what you are testifying under oath to the Court here?

A. In his place—what's his name? Tennyson's. The steamship couldn't deliver.

Q. I am talking about Sam Asp, not Tennyson.

A. I don't remember exactly how many.

Q. He didn't have any of your cans there, did he?

A. He did. They were shipped to Sitka from there.

Q. When the marshal went over and attached or foreclosed the mortgage on every can in the place, why didn't you claim them if they were yours? The marshal foreclosed the mortgage and took all the cans out of there—

A. My cans were probably shipped out prior to the marshal's arrival there.

Q. As a matter of fact, you didn't furnish any cans; the cans were furnished by Reno-Johnson-Sjjoblom, Inc.? A. That is not so.

Q. I want you to read that letter in which the

(Testimony of Sigmund Einstoss.)

attorneys are trying to collect for the cans they sold Sam Asp for the 1949 season.

A. That was in March; that was prior to the time—I didn't know anything about the transaction at all.

Q. Look at the date again, Mr. Einstoss. That is March, 1950. He is trying to collect for 1949 cans. [25]

A. That was prior to the time that I entered in the transaction with them; that was the year before.

Q. Read the letter again, Mr. Einstoss—it says 1949 season in May—before you testify.

Mr. Paul: What has that got to do with the season starting August 15, 1949, your Honor?

Mr. Monagle: The Court knows of his own knowledge that they don't pack salmon between May and August in this country.

The Court: I assume they get the cans before the season opens.

A. Dated May 9 for some cans; these cans were shipped by another man, Gene O'Brien, who was supposed to finance them and who they had a disagreement with, and these fellows bought the cans, and they expected to go in but they didn't. I knew nothing about it and don't know now, but that has nothing to do with my transaction at all. I shipped out cans. I bought three thousand cases, I think, from the Douglas Canning Company here and I shipped out two thousand cases—no, I think about five thousand cases or more; I don't know exactly—from the Continental Can, but I supplied more than

(Testimony of Sigmund Einstoss.)

enough cans for my salmon, and until about the middle of this summer I used them in Juneau at Don Milnes' place, from John Tennyson at Tenakee, because their dock was not safe and the Alaska Steamship wouldn't [26] go there and deliver it, and some of the cans that were left over, my cans, were shipped over to Sitka on the boat "Forester." I supplied all the cans that was needed in connection with my canning there, plus——

Q. You know those eighteen hundred cases of cans were shipped in there, but these people, you said, were going back for them.

A. I don't know at all about it.

Q. You just testified to it, didn't you, that a fellow by the name of Kelly or something——

A. I heard later. I know it now.

Q. You know they had over two thousand cases of cans?

A. That had nothing to do with my cans whatever. I had my own cans and more than too much. Five thousand were brought into Juneau, and about six or seven or eight hundred cases were shipped to Sitka at the end of the season.

Q. What, if any, statement did you ever make in connection with your operations out there—I mean written statement or accounting—since April 11, 1950, or since the statement attached to your affidavit of April 11, 1950? What other statement have you made, or accounting, between you and Asps than the one that is attached to this affidavit here?

A. To who?

(Testimony of Sigmund Einstoss.)

Q. Sam Asp, Maude Asp, or either or both of them. [27] A. None I know of right now.

Q. What became of the rest of the money then for the 6958 cases?

A. They owe me thousands of dollars now which I don't expect to collect because they are insolvent.

Q. Why wasn't that shown on this statement attached to your affidavit?

A. What they owe me?

Q. This was supposed to be a statement of the conditions that existed between you and them, wasn't it?

A. I don't know what it is supposed to be. I told the bookkeeper to make up a statement and I suppose that is what he made.

Q. When you swore to this affidavit, you don't mean to say that you put an untrue statement on it?

A. I didn't intend to put in an untrue statement and I don't now. I asked the bookkeeper to make up a statement and I told him to mail it to him, and I probably never seen it.

Q. What kind of a statement?

A. In connection with the dealings with Sam Asp.

Q. A true and correct statement?

A. Supposed to be; absolutely.

Q. Look at this statement. It can't possibly be true and correct, could it? If you can buy six thousand cases of fish for eight thousand dollars, why you would buy them every day, wouldn't you? [28]



(Testimony of Sigmund Einstoss.)

A. They didn't charge them with those cases at all. This shows what we paid.

Q. That is not a true statement then?

A. I wouldn't say it is or it isn't. It is the statement we had at the time. The cans were never charged to him, so they were not on the books.

Q. Don't you mean to say, it was just made up for the purpose of this case; wasn't it?

A. No, not at all.

Q. Have you made a true statement since then?

A. I made no statement of any kind.

Q. Has your bookkeeper made a true statement?

A. Yes.

Q. Do you know how you stand now with Sam Asp and Maude Asp?

A. They owe me several thousand dollars.

Q. Will you show me your ledger sheet showing how much they owe you?

A. I figured it this morning.

Q. I want to see your books.

A. They come from the books.

Mr. Paul: Come get them.

A. No use for me to figure it because I know I can't collect anything.

Q. To save time, I don't want to see a bunch of work sheets; I want to see the books. [29]

Mr. Paul: There has been no offer of work sheets, your Honor.

The Court: He is just warning you.

Mr. Monagle: Just saving time is all.

Mr. Paul (Addressing the Witness): Take the

(Testimony of Sigmund Einstoss.)

whole business, statements of accounts, three thousand cases from Douglas Canning Company.

A. Well, I am no bookkeeper. I can't tell you anything about the records. All I know is that we bought three thousand cases from the Douglas Cannery and we shipped out many thousands of cases of cans which were probably not charged to Sam Asp. There was no reason to charge Sam Asp. All we charged him was cash advanced and, when I figured up after the salmon were examined, we found they owed several thousands of dollars.

Q. I asked for the books that your bookkeeper keeps showing this.

A. These are the records my bookkeeper sent me.

Q. I want your books, not something that somebody copied out of some books. The subpoena said your books, not some extracts from the books.

A. I understood the records, not the exact books.

Q. You were in Court before when the matter was gone into with the Judge right here and you said it would take you three weeks to get them from New York. [30]

A. I was in court?

Q. You were here and told the Judge that it would take you three weeks.

Mr. Paul: No. It was my statement.

Mr. Monagle: He was under subpoena. He was at the door. To refresh the Court's memory, when Mr. Paul insisted on this case being put over until today, he said the season wouldn't end until—this was first set for June sometime, and he said that Mr. Einstoss couldn't get his books from New

(Testimony of Sigmund Einstoss.)

York prior to three or four weeks and the season would then be in course and that he couldn't possibly get here until after the fishing season and he insisted it wouldn't be before September 20th.

Mr. Paul: Your Honor, if they want the original invoices that are reflected by the figures the witness has in his hands, we have them here.

The Court: Well, as I understand it, what counsel wants is something not only complete but something in the way of a ledger sheet or the account itself that would show at a glance the state of the dealings between them and any balance or credit, and counsel probably doesn't want to, unless he has to, examine each individual invoice or receipt but, if you don't have the ledger account but you have what makes up the ledger account so that it shows the account between them complete, I suppose, although that would take longer, it will [31] have to be gone into.

Mr. Paul: The witness has in his hand, your Honor, an account that is just about as complete as it is possible to get. There is only one or two items that he has already mentioned. That is the oil bill——

The Court: He has testified now here for probably half an hour on cans alone. I don't understand his testimony yet. I don't understand whether the cost of the cans that were furnished is included, for instance, in the first item "Cash, \$2904.00." He has made statements from which you could infer that and he has made statements contradictory,

(Testimony of Sigmund Einstoss.)

though now, I am like counsel, I don't know what it is here in this courtroom today that shows the state of the account between the Asps and the claimant here.

Mr. Paul: Your Honor, that is one of the reasons I made the suggestion that counsel take all our papers and look over them. We spent a lot of time discovering the discrepancy between eight thousand some odd dollars in the statement that was attached to the affidavit and the figure just underneath, seven thousand and eight hundred some dollars. When you look at it, there are two items crossed off, and the difference between the two figures is exactly the sum of those two items. The obvious explanation is that the lower figure was typed in later.

The Court: Why isn't the upper total crossed out? [32]

Mr. Paul: I don't know, but the most obvious explanation is that it just wasn't crossed out. If we can spend a little time doing that, I think—counsel is just kind of fishing around hoping that one or two of these obvious discrepancies might trip up the witness. When they are explained—

Mr. Monagle: May it please the Court, a child in the second grade can multiply 6958 by \$16.25 and get more than all these figures doubled again. It shows on its face it is not correct.

Mr. Paul: It is not the full account.

The Court: That is what he is examining him on, as to the full and complete account between them.

Mr. Paul: The witness has it, as I say, except

(Testimony of Sigmund Einstoss.)

for one item, and here is the invoices to substantiate everything in the account.

Mr. Monagle: That is the whole thing, may it please the Court. I don't have to assume that all the invoices are there. They can come in here with self-serving invoices and then want to confine us to that on examination. In other words, Mr. Einstoss testified he has three bookkeepers. Now, he certainly can't convince me, and I don't think he can convince the Court that his bookkeepers keep books like that. Those aren't his books, and he knows it.

A. That is not so. I don't know anything about it. This is the correct copy from the bookkeepers that you asked me to [33] bring. May I make a statement? I say on oath that these papers that you got before me represents cash and nothing for cans.

The Court: But what is there that shows the complete account between you and the Asps? This isn't of much value unless you have something that shows the complete account.

A. This was just cash and not cans.

The Court: I know it doesn't cover cans, but I don't see why it doesn't. If you make out a statement as to what you have spent——

A. Just a temporary statement, this particular statement, to show how much cash we advanced to the account until——

The Court: I know it wasn't the final statement but, if it was a statement before the final statement, why didn't it contain everything you advanced up



(Testimony of Sigmund Einstoss.)

until that time? That is what isn't clear to me.

A. It wasn't necessary in my mind at that time. All that was necessary at the time was to show the cash. She knew it was \$1.50 and she had no money coming. When we found at the end of the season that some of the salmon were condemned, they owed several thousand dollars. It was no use doing anything because they haven't got nothing.

Q. When you were in Mr. Ziegler's office a week ago and had him phone up and find out who was going to pay your fare up here or if your deposition could be taken, he told you [34] that I wanted your books, didn't he? You knew that subpoena called for your books. You mean to say Mr. Ziegler didn't tell you that?

A. I don't remember the exact words that he said. I asked for records, and that is what I got.

Q. This subpoena said to bring all your cancelled checks. Maybe that will explain it. Have you got all your cancelled checks here?

A. They sent me all this. I never looked at them until last night.

Q. Show me the ones for the cans.

A. I will show you for the Douglas Cannery. I have got it.

Mr. Paul: Look at it, counsel, and see if that isn't the ledger account. Here is a carbon copy of checks, bank schedules; here is some more.

Mr. Monagle: I don't know what it is myself.

Mr. Paul: Well, there is some more.



(Testimony of Sigmund Einstoss.)

A. There is \$5119.00 paid to Douglas Canning Company by check.

Q. Well, I want to see your other checks too, Mr. Einstoss.

Mr. Paul: Sure.

The Court: Well, now, what is there in the record to show that this is chargeable against the Asps? I think there should be a ledger account to show that.

Mr. Monagle: There is nothing. That is the whole trouble. [35]

A. He never bought any cans himself.

The Court: Can the Douglas Canning Company prove that?

A. I suppose they can.

Mr. Paul: Bills of lading too.

A. No question about it.

The Court: As I say, all that should be reflected in a ledger account and it would show it quickly.

Mr. Paul: I think this is a ledger account myself. I am not much of a bookkeeper either.

The Court: We have been discussing now the condition of the account between the two for the past half hour, and there doesn't seem to be anything available here that would throw any light on it. It is just inconceivable that regardless of whether the operation was a profitable one or not that there wouldn't be something to show the state of the account between them.

(Testimony of Sigmund Einstoss.)

Mr. Paul: Counsel won't introduce it as an exhibit.

Mr. Monagle: I have a bunch of checks from S. Einstoss to S. Einstoss.

Mr. Paul: It is a statement of accounts for 1949, the first and second season, what the witness had in his hand.

Mr. Monagle: May it please the Court, counsel knows those aren't books.

Mr. Paul: Here is the ledger it was taken [36] from.

Mr. Monagle: I submit if he can get those statements from those books—just can't do it. It is only a fish-buying ledger.

Mr. Paul: Oh, no.

Mr. Monagle: I submit, if he can show in there, showing the purchase of any cans from anybody, why then I will concede the whole case.

Mr. Paul: It is your witness.

Mr. Monagle: Go ahead and show it to the Court. You say it is in there.

The Court: Well, you may continue your cross-examination to determine what the state of the account is or some other phase or aspect of the case.

Q. Now, as I understand—

Mr. Paul: Your Honor, I think we ought to have these marked as exhibits. I don't like to have them floating around the courtroom.

Mr. Monagle: When I get the books, I will introduce them.

Mr. Paul: Just so they don't float all over.

(Testimony of Sigmund Einstoss.)

Q. Did you or did you not bring your books and records of advanced items between you and Sam and Maude Asp with reference to the canning of fish?

The Court: You mean the books of original entry?

A. Books of original entry. [37]

The Court: The first time you make an entry on these particular records; not something you copied.

A. I didn't know what you exactly needed, and to the best of my knowledge I got everything you asked for. That is the way I told the bookkeeper, all records in connection with that transaction, and this is what he sent, whatever you call them. It doesn't look to me like the original books.

Q. Well, you know they aren't?

A. Yes, I know.

The Court: You can't use a substitute over objection. The only time a summary is allowed to be used is when the books are so voluminous that it wouldn't be practicable to bring them in the courtroom.

A. If your Honor will give us time, I will bring everything that I know what you want.

Mr. Paul: I think everything is here, your Honor.

Mr. Monagle: I don't think there is.

Mr. Paul: I don't like the insinuations. We have everything here.

The Court: Do you have the books of original entry or only copies?

(Testimony of Sigmund Einstoss.)

Mr. Paul: They look to me like books of original entry. They have got all sorts of items; cash advanced to Sam and Maude Asp.

The Court: But it seems to me there ought [38] to be some account like a ledger account in which all these things would appear in more or less summary form and tell the Court at a glance, or anybody else, the status of the account.

Mr. Paul: Here is the money that Oakson spent and what it was spent for.

The Court: In other words, you have all the records there or the books there, you might say, except the ledger account where everything would be sort of consolidated?

Mr. Paul: Yes.

The Court: Then why isn't the ledger account here?

Mr. Paul: I mean to say this is the ledger account. For instance, it has under expenditures for a particular boat all the items spent for fish purposes and oil——

The Court: But wouldn't that require a posting to the ledger account between the two of them? Otherwise it is not a ledger account.

Mr. Paul: I don't know if they make up that or just this kind of final statement.

The Court: If my knowledge of bookkeeping is of any value, I think that any business man can glance over his ledger account and tell what the status of the account with any particular customer or with anybody in the field is. He wouldn't look

(Testimony of Sigmund Einstoss.)

at half a dozen books and then spend hours digging it out.

Mr. Paul: We have the result of the records [39] the witness is so eager to identify.

The Court: Well, you haven't got anything such as a ledger account to which I have been referring. If counsel is satisfied with these component parts of it, I suppose he may examine them. He will have to do that.

A. Your Honor, may I make another statement. It so happened that I was sick in the hospital and that put me back taking care of this last year, and in the meantime this year's business come up. I didn't know such a thing was coming up. As far as the records, I told them to get everything in connection with it. I didn't mean to withhold anything nor do I. We have a bond for this year and it is still good. If counsel prefers, we will adjourn it and let him tell us exactly what he wants. No reason on my part—everything I say here is the truth.

The Court: You say everything you say is the truth and yet in the next breath you say you don't know anything about it because you personally don't keep them.

A. I personally don't keep them.

The Court: How can you say everything is the truth?

A. I mean my statement is true, no intent on my part—

The Court: When you make a statement that all these are true and then you say in the next breath

(Testimony of Sigmund Einstoss.)

that you don't know anything about them, you don't keep them, then your first statement can't be right. [40]

A. As far as I know, and as far as the book-keeper knows.

The Court: As far as you know, but you don't know very far.

A. That is right. They should be. If there are any other records required, we can adjourn if your Honor permits and let him tell me what he wants or I will bring the bookkeeper. I don't know anything about records.

Q. Let me ask a question. You pay three book-keepers and an accountant to keep records like that? A. I do.

Q. You are telling the truth that these are the only books and records you have; is that right?

A. This is the only books they sent me, and I asked for all in connection with the operation.

Q. How could you find out if the man took thirty thousand dollars if this is the kind——

A. I found out later.

Q. You have a regular ledger sheet on how much you paid out to Sam and Maude Asp, Tenakee Fisheries, and how much fish you got, and how much you got from the fish; isn't that true?

A. I can just repeat——

Q. I am asking if this is true or not.

A. I don't know anything about my books, never looked to speak of or know. I depended on my book-keeper and [41] accountant. All these books you



(Testimony of Sigmund Einstoss.)

mentioned you want, I will have the bookkeeper come up.

Q. You were given a subpoena by the Court. Can you read—"bring all books and records"?

A. I asked for all the records.

Q. Didn't Marshal Hellan serve you with a copy? A. Yes.

Q. Doesn't it say "books and records"?

A. I misunderstood them.

Q. Is there anything there says "part of the books and records"?

A. I asked for all I knew of, and that is what I received.

Q. I want to ask you another question. Be sure you consider it carefully. Didn't Mr. Ziegler tell you that, when I phoned him last Friday or Thursday when you were there in Ketchikan, that I would take your deposition ahead of time so you could go south if you brought all your records and books according to the subpoena?

A. Mr. Ziegler told me at the time at a union meeting, and I was upset with all kinds of trouble with the union and I didn't pay attention to what he said or didn't say. All I was interested to know at the time was whether you would consent to a deposition and——

Q. You asked him to call me and then you didn't pay attention?

A. And I walked out when he called you. [42]

Q. You didn't pay attention to what he said?

(Testimony of Sigmund Einstoss.)

A. He said that the time was short. I have to go here anyway so it didn't matter.

Q. He told you to bring your books and records?

A. I don't know exactly what he told me.

Q. You won't deny he told you that, will you?

A. These books were here already before. I mean they were all wrapped up. I brought them last time and, when the case adjourned or whatever you call it, and I took them back with me to Seattle, and I asked for them again, and they sent them here the other day.

Q. You had those books here the last time you were here in court, did you, all these records?

A. Whatever it was.

Q. Then why was it that your attorney informed the Court that you had to get your records from the States and you couldn't go to trial at that time?

Mr. Paul: Just a minute, your Honor. Counsel is confusing this. The first setting requested by us was requested late because of the difficulty of the fishing season, and counsel asked for a second postponement, and that is the one we are going to charge him for his coming back to Juneau a second time.

Mr. Monagle: It wasn't the last one, may it please the Court. I think Mr. Einstoss just deliberately failed to [43] bring these books.

A. That is not so.

Mr. Monagle: He says he had them here the last time he was in court. The postponement at that time was because the fishing season was coming on

(Testimony of Sigmund Einstoss.)

and he had to get his books from New York, as I remember.

Mr. Paul: That is what he said.

Mr. Monagle: He testified he had them here all the time.

Mr. Paul: If counsel wishes, I will bring up the wrapping paper. I unwrapped them yesterday.

Mr. Monagle: He says he had them here last time. He ought to know. The only way I know how to proceed is to make him get his books here. I don't think we should take a lot of phoney records, transcripts from books and records.

Mr. Paul: Your Honor, I made the suggestion to counsel, and I think it is a good one and I think it will save the Court's time. We have the original invoices, and one of them is on the Douglas Canning Company's stationery. It is impossible for us to make up any phoney statement from that. We have the cancelled checks.

The Court: That is all true, but counsel can answer that by saying that you didn't bring all records of that kind here. How would he know that all records of that kind were here? You might have six invoices, whereas there [44] might be ten in existence. There is no way of knowing it without a ledger account.

Mr. Paul: If there were ten in existence, that would be money owed Einstoss from Asp—a good deal larger.

The Court: Well, take the converse of the thing.

Mr. Paul: We are willing to produce a state-

(Testimony of Sigmund Einstoss.)

ment from the Douglas Canning Company. It is inconceivable that counsel would think that is a forgery.

The Court: I don't think the objection is that any of the records are a forgery or false or anything like that, but that they are incomplete, that the original records, or you might say the books of original entry so far as a ledger account is concerned, showing the status of the account between the Asps and the witness, are not here.

Mr. Paul: Well, I don't know anything about that, your Honor.

The Court: Well, it is incredible that there wouldn't be such an account complete.

Mr. Paul: It is not incredible to my mind. When you look at the final report, your Honor, why there are cash receipts and disbursements.

The Court: But where is the final report?

Mr. Paul: The witness had in his hand; the entire season.

Mr. Monagle: May it please the Court, I [45] haven't gone over every single item here, but I submit there is nothing in these ledger sheets here prior to September 30, 1949, and there is nothing in them after October 15, 1949. It can't be; it is impossible for them to be books and records that were kept of the transaction because he testified that Asp was packing fish for him the whole season, 1949. The season started in August, and the first season ended in September. This started September 30th. That couldn't be his books and records. It

(Testimony of Sigmund Einstoss.)

would be impossible according to his own testimony. It is either a worksheet or something that is gotten up afterwards or something copied from a book.

The Court: Is there anything here on Tenakee?

Mr. Monagle: I couldn't find anything. I might have overlooked it, but I don't believe so.

Mr. Paul: There is one there. Salt Sea Fisheries is the title of the page.

Mr. Monagle: I didn't see it.

The Court: Well, this is it.

Mr. Monagle: Does that take in the entire season?

The Court: You can look and see.

Mr. Monagle: Well, it starts October 7th, may it please the Court, 1949, and ended October 19th.

The Court: What is the first item there?

Mr. Monagle: Frank Jack, 2 $\frac{3}{4}$  H at \$1.60.

The Court: Does it purport to be the entire account? [46]

Mr. Monagle: Well, the total is in the debit side, \$694.71, and the balance. The credit, he has a credit item, \$3702.00, and a debit balance, \$694.71. The credit is 2468 cases at \$1.50, October 16, 1949, at \$1.50, a credit of \$3702.00. He testified he agreed to pay \$3.50. I don't know what that means. It doesn't cover the season 1949. It doesn't start until October 7th.

Q. Does that purport to be a record of your transaction with Sam Asp and Maude Asp, the page I am showing you?

(Testimony of Sigmund Einstoss.)

A. From what I heard you say, that must have been the second season.

Q. Will you explain this item, 2468 cases at \$1.50? What does that mean?

A. It could mean two things, either cans, or it could mean so much advanced. I don't know.

Q. You don't know? A. No.

Q. If it was the cans, why would it be put in as a credit?

A. I don't know anything about books.

Q. In other words, if you advanced \$3702.00 worth of cans or 2468 cases of empty cans, you would charge those to Sam Asp, wouldn't you?

A. I don't know how they kept the books.

Q. You wouldn't credit him for that, would you?

A. I don't know nothing about books. [47]

The Court: Did Asp return any cans?

A. He used my cans for all fish he packed. I shipped them out, and later on took them back at the end of the season, five thousand, Tennyson's a short distance from Tenakee, and others were taken to Sitka.

Q. When did the season end last year?

A. The first or second?

Q. Second.

A. October sometime; I don't know.

Q. Why would you be sending him empty cans, 2468 empty cans, on October 16th when the season is practically over—is over?

A. I can't answer that. I couldn't say if I did or not.



(Testimony of Sigmund Einstoss.)

Q. And besides that, why would you be sending him 2468 cases of cans when you claim you had five thousand there when the season was over?

A. Asp packed fifteen thousand cases.

Q. During the second season?

A. That is what he said, but he didn't anything of the kind.

Q. Why weren't the transactions for the first season set forth in your records here?

A. You can ask. It is the same story. I know nothing about records.

Q. Where are your records for the first season, your books, your ledger sheets? [48]

A. I asked for all the records. They are supposed to be here.

Q. I am talking about ledger sheets like this.

A. That is what I received, and I gave you all I received.

The Court: How many cases did the Asps pack that were accepted? Do you know that?

A. Not off hand, no; probably about six thousand.

The Court: Would it be in that account?

A. Should be, but I don't know whether it is or not. It is no use showing me records because I know nothing about records.

The Court: It seems to me, from his repeated statement that he knows nothing about it, that we are just wasting time here.

A. Can I ask your Honor, can I bring my book-keeper from Seattle at my own expense and bring

(Testimony of Sigmund Einstoss.)

all the records—it will be agreed here today—if your Honor will let him explain to your satisfaction.

The Court: Have you anything to say in response to that suggestion?

Mr. Monagle: The only thing is they have been stalling this thing off since——

The Court: It would be only on terms. They would have to pay all the accumulated costs.

Mr. Monagle: I want to ask him just a couple more questions. [49]

Q. Would you know why the payment of five dollars to Billy Miller was charged to the Asps on this account?      A. No.

Q. Do you know why \$288.08, a check paid to Pete James, was charged to them?

A. Because my man had instructions not to give Asp too much money, and he paid out to people who worked for Asp and charged to him. That is what I believe it was.

Q. You don't know?      A. I wasn't there.

Mr. Monagle: I guess that is all we can do, may it please the Court.

Mr. Paul: Subject, your Honor, to any showing of materiality, I think the records here and the effort of the witness to get all his books and his reasonable response to the subpoena and everything what we have here already merely goes to prove what the ledger sheets would show anyway if there are other ledger sheets.

The Court: I think counsel is entitled to a ledger account.

(Testimony of Sigmund Einstoss.)

A. How about the possibility of the book-keeper——

The Court: The big obstacle, as I see it, here is that the witness doesn't know anything about the books.

Mr. Paul: It can be secured, your Honor, by looking at the cancelled checks. [50]

The Court: My answer to that has been all along that, while they speak for themselves as far as individual transactions are concerned, there is nothing to show a complete account. There is nothing to show that that is all the invoices or checks or anything else. An account kept contemporaneously, or nearly so, as accounts of that kind are kept, would certainly be the account to produce here.

Mr. Paul: I thought we were pretty much limited to who owned the cans; that is, only two items.

The Court: You mean the eighty-five cases of canned salmon?

Mr. Paul: No. The empty cans.

The Court: What was it that was attached? The empty cans or——

Mr. Paul: The full cans were attached ultimately. But it started out with Asps agreeing to furnish cans. Actually Einstoss furnished them and deducted \$3.50, the cost. The Douglas Canning Company is one item, and there is a check in payment, and there were further cans bought by Einstoss from the Continental Can Company.

The Court: But wouldn't the fact as to who had

(Testimony of Sigmund Einstoss.)

any right to the cans there depend on the final settlement between them?

A. There was no final settlement.

The Court: There is no way of ascertaining [51] that that I see.

Mr. Paul: The Witness said there was no final settlement. He just gave up.

The Court: But counsel isn't satisfied with that. He wants the records that would corroborate the witness.

Mr. Monagle: In other words, the books are just part of the case. We can prove that Asp sold fish from that cannery, that everything packed at that cannery didn't go to Einstoss regardless of what he testified on the stand. This is just part of the case, the books.

Mr. Paul: What does that go to prove? That Asp is a liar and cheating Einstoss too?

Mr. Monagle: No. It goes to prove his books are wrong.

Mr. Paul: If there is anything more, we will furnish them, your Honor. The accumulated cost, I don't think will amount to very much.

Mr. Monagle: Considerably. We have a hundred cases of salmon——

Mr. Paul: Accumulated cost of delay, up to tomorrow afternoon. In other words, we have a day and a half accumulated cost; that is all.

Mr. Monagle: You mean if all the books are here tomorrow, you mean.

Mr. Paul: I can call them up. [52]

(Testimony of Sigmund Einstoss.)

A. Let me correct you. Who I want is the accountant. You will know what he is talking about.

Mr. Paul: Do you think he can get on the plane tomorrow?

A. I don't know if he can. Let's get a week's time at least.

The Court: Well, it seems to me, if I recall the rule correctly, that whatever expense a party is put to by reason of having to grant a continuance, is chargeable.

Mr. Paul: That is right. If there are further books and if it requires an extra day and a half to get them here, the extra expense would be a day and a half.

Mr. Monagle: I don't care about the day and a half. If the Judge goes to Ketchikan before the books are here, it will be a month or six weeks, and we have one hundred cases of salmon under attachment on which we are paying storage every day.

Mr. Paul: What has that to do with us?

Mr. Monagle: Part of the expense of the case.

Mr. Paul: Oh, no. You got a default judgment against Sam Asp and you can sell that stuff any time you want to. You could have sold it months ago.

The Court: We don't need to settle the matter of accrued costs now, but it is something that will have to be paid because of the continuance.

A. Your Honor, may I make a statement? The cost per case [53] may be three or five cents a month and, if there is one hundred cases, it can be three or five dollars. We will pay it.

(Testimony of Sigmund Einstoss.)

Mr. Monagle: Not on the City Dock.

A. I suppose it is ten cents.

Mr. Paul: Will we get all our papers back or are they going to be introduced as evidence?

The Court: Well, maybe they better be marked for identification or left with the Clerk if they ultimately are coming into the case.

A. I want to be frank. The attorney doesn't understand. I am going to call up as soon as I get back to the hotel and try to get the accountant here, but I don't guarantee that it will be a day and a half. Maybe he can't get here for a week though.

Mr. Monagle: We should have a definite time. This has gone on over a year now.

The Court: The Court can't tell when it will be here; I think around the first of November unless they send some cases down from Anchorage for trial down there.

Mr. Monagle: Could we put it this way? It is understood that the subpoena, Mr. Einstoss is still under subpoena and will appear on notice to his attorney.

The Court: The Court has the authority to order anybody in the courtroom to appear at a certain time. [54]

Mr. Monagle: Yes.

The Court: That will be the order.

Whereupon, the hearing was recessed; and thereafter on the 23rd day of January, 1951, at 10:00 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for further hearing, the Honorable



George W. Folta, United States District Judge, presiding; the plaintiff appearing by M. E. Monagle, his attorney; the garnishee-defendant appearing by William L. Paul, Jr., his attorney; and, respective counsel having announced they were ready to proceed, the following occurred:

The Court: Well, does anybody remember where we left off when we were on this case before?

Mr. Paul: As the Court stated, additional time in which to produce more records, and I stated to the Court that I thought we had them all, but on further consultation with Mr. Einstoss' accountant I find there are a few more records and have him here to identify them, and on the additional point also of justifying what has already been handed in to the Court, and he is prepared to do that, too.

The Court: Now, what has already been what?

Mr. Paul: There are a quantity of records that have already been handed to the Court and are on the Clerk's desk.

The Court: When were they left with the Clerk?

Mr. Paul: In response to a subpoena.

The Court: When? [55]

Mr. Paul: Four months ago, I think.

The Court: Well, were they here at the time of the last hearing?

Mr. Paul: Yes; but they are, in the condition they are they were hardly intelligible to counsel, and Mr. Ramsey is here to explain those too.

The Court: I suppose it is your move now to put Mr. Ramsey on the stand.

Mr. Paul: Yes, indeed.

## ROBERT L. RAMSEY

called as a witness on behalf of the garnishee-defendant being first duly sworn, testified as follows on

## Direct Examination

By Mr. Paul:

Q. Will you state your full name please?

A. Robert L. Ramsey.

Q. What is your occupation?

A. I am a C.P.A. in the State of Washington.

Q. How long have you been a C.P.A.?

A. Since 1937.

Q. You work for S. Einstoss?

A. I don't work for him. I have done work for him but I am not an employee of his.

The Court: You mean you are independent?

A. I am independent; yes, sir.

The Court: You do work for him just like you do for anybody who calls you or employs you for a specific purpose?      A. Yes, sir.

Q. How long have you been doing this work for Mr. Einstoss?

A. About the past three years, approximately.

Q. And how often would you be called upon? What was the arrangement for this work?

A. Whenever he calls upon me, and I have some things I do for him whenever he wants, sending reports to New York.

Q. What does it consist of?

A. The reports to New York are usually a trial balance of his Seattle accounts which I send to the

(Testimony of Robert L. Ramsey.)

home office in New York and certain tax returns and reports for his property in various states.

Q. All tax returns?

A. All except the Federal Income Tax Return which is prepared in New York by a firm of accountants there.

Q. Would you say once a month?

A. At least that. There has been a month or so that we missed, but generally speaking that is true.

Q. Does he call you or do you just show up?

A. He at times calls me, and at other times I know that certain things are coming up and I go down and do them because he is not there all the time. In fact most of the time he is absent.

Q. What access do you have to his office?

A. I have access to it all the time that it is open; I don't have a key to the door; but during normal working hours.

Q. With respect to the records, what access do you have?

A. I have complete access to them.

Q. Are you sure you have complete access?

A. Yes.

Q. How are you sure?

A. Well, all the records that are in the office, I am privileged to go to them. They are all in the files.

Q. Isn't anybody there to direct what records you can get or prohibit you?

A. He has some girls and a bookkeeper. They

(Testimony of Robert L. Ramsey.)

know where they are, but I have the privilege of going and getting them.

Q. About four months ago, Mr. Ramsey, Mr. Einstoss was required to produce and deposit with the Clerk of this Court all his books, papers and records in connection with his business arrangements with Sam Asp and Maude Asp in the Salt Sea Fisheries operation. Who was the one that actually gathered those records together?

A. I was.

Q. And what was the occasion for gathering them together? Did you get a telegram or something like that?

A. My recollection is it was either a telegram or a phone [58] call to his bookkeeper, and he in turned called me in, and I gathered such records as I could find there and sent them to Mr. Einstoss.

Q. When you did get those together, did you miss anything?

A. Yes, I did. Apparently there was a misunderstanding as to the purpose of them, and certain ones I did not know were required and did not get sent up here.

Q. Just what? Have you brought them with you now?

A. Yes. I brought some additional papers and I brought Mr. Einstoss' general ledger which is this bunch of papers.

Q. Marked "General Ledger 1949 to 1950"?

A. That is right. His fiscal year ends July 31st each year.

(Testimony of Robert L. Ramsey.)

Q. So this would be August 1, 1949, to August 1, 1950?           A. That is correct.

Q. What else have you brought?

A. This paper file and records which had to do with this matter.

Q. These are all the papers you have?

A. As far as I know.

Q. I see on the top here same papers marked "Tenakee, Summer" and also one marked "Schedule A". Is this the first time these have been in court?

A. No. Those were taken from the court's file. There is a receipt. I noticed in the file the other day a duplicate and a receipt where you removed them. [59]

Q. The others consisting of bills of lading, paid checks, some invoices for reconditioning salmon, you are now producing?           A. That is correct.

Q. And where did you get these?

A. From his files in his office.

Q. Do you think you have missed anything?

A. I really don't know. I don't think so.

Q. Now, calling your attention to what was in the court file already, Tenakee, Summer, estimated on a basis of 4500 cases, have you had an opportunity to go over the material that you are now producing and what was in the custody of the court already to determine whether Tenakee, Summer, is accurate or not?           A. Yes.

Q. And what conclusion do you reach?

A. Generally speaking it was accurate, but there were some changes necessary to revise it on the

(Testimony of Robert L. Ramsey.)

actual cases produced. That was on the basis of 4500 cases. Actually there were slightly less than that.

Q. How did you verify your result of Tenakee, Summer?

A. From the records I brought and those there. There were documents substantiating the information that was on that report. There was one schedule that was incorrect and which I revised. [60]

Q. You are mentioning now Page 3 of Tenakee, Summer? A. That is right.

Q. What is the matter with that page?

A. Apparently the man who prepared it has some items which were credited to Sam Asp and which are merely a breakdown of some advances which are charged to him. I have eliminated those from my revised report.

Q. To eliminate duplication?

A. Duplication of those items.

Q. With respect to Schedule A which was in the custody of the Court, have you made a similar examination of that?

A. I looked at those and made a similar examination. That is complete as it stands. I didn't have to revise that at all.

Q. Have you worked up your examination on Tenakee, Summer, and also Schedule A so that it will reflect the entire 1949 operation with Sam Asp.

A. Yes.

Q. You have copies of that available, have you?

A. I have my manuscript copy and a copy; yes.



(Testimony of Robert L. Ramsey.)

Q. Let's see one if you please.

Mr. Paul: I am about to question the witness on this work.

Q. Now, calling your attention to Page 3 of this 1949 combined statement, I see on the bottom "Balance Due S. Einstoss, [61] \$131.86". I take it from your answers that that is correct.

A. To the best of my knowledge.

Q. What about the oil bill?

A. I do not have any information about that oil bill, although I know there was an amount due the oil companies which Mr. Einstoss had guaranteed to the oil company which was not paid by Mr. Asp, and Mr. Einstoss subsequently paid it. I do not know the amount of it.

Q. Whatever the amount, it would increase the amount due to S. Einstoss?

A. That is correct.

Q. Now, with respect to all the entries on this combined statement, were you able to find vouchers or paid checks, receipts, indicating that the money was actually expended?

A. Most of them, except for two advances for payroll and a number of small items which were under twenty-five dollars; there were not receipts in the file.

Q. For these number of small items describe generally what the characteristics are of them and whether it would be unusual for, in this type of operation, for those to be missing.

A. They were small items, and I don't think it

(Testimony of Robert L. Ramsey.)

would be too unusual. Twelve dollars and eight dollars, I see going down the line. One was for whiskey for fishermen. Probably [62] no receipt could be obtained for that. That amounted to nine dollars, and I am not surprised there were no receipts in the file for it.

Q. Have you ever had occasion to examine Mr. Einstoss's business operations to determine whether the 1949 operation was typical?

A. Yes. That is a typical operation. He advances money for the operation and sends some man out there to be in charge of it, and the man pays out money, and he in return receives the product, either canned salmon or frozen fish, and he is not too concerned with the details of it as long as he receives what in his mind is sufficient canned salmon or fish.

Q. This, marked Tenakee, Summer, is marked "estimate". Why wasn't there ever a final account made of that?

A. I believe there wasn't because, when the season was over, Mr. Einstoss determined he did not owe Mr. Asp anything and he wanted no more work done on it.

Q. It was a case of spending more money to discover you lost money?

A. That would be his thinking on it.

Q. With respect to making up the income tax reports, does the report claim a loss?

A. The loss would be reflected in the books because the total advances were charged to fish pur-

(Testimony of Robert L. Ramsey.)

chases and, since that [63] was the total money he paid out, that would be his total cost.

Q. When ordinarily would the income tax reports be made up for the 1949 operation?

A. Two and a half months after the close of the fiscal year which would be after July 31st.

Q. That would be August and September and up through the middle of October, 1950?

A. That is right.

Q. When the time limit was to have the income tax report made up? A. That is right.

Q. Do you know if they were made up?

A. No; they were not made up at that time, because unfortunately that is the height of the fishing season and the office force is busy and they usually get an extension.

Q. Do you know if there was an extension in 1950?

A. Yes; there was. It was completed January 15th of this year.

Q. January 15, 1951. There has been some testimony about Mr. Einstoss' unfamiliarity with his bookkeeping system. Do you know anything about his unfamiliarity with his bookkeeping system?

A. Mr. Einstoss, I would say, is not familiar with the technics of bookkeeping or accounts, although he is able in [64] his mind to form a pretty accurate answer to what his profits or his losses are in any one operation.

Q. What was the occasion for your starting to work for Mr. Einstoss?

(Testimony of Robert L. Ramsey.)

A. He had some trouble with one of his accountants. In fact the man embezzled some money and he called me in to try to find out the amount he embezzled.

Q. Do you know what the amount was?

A. In the neighborhood of thirty thousand, although we never could tell exactly.

Q. Was there any prosecution of the accountant for that?      A. No.

Q. Was there any evidence from the accountant that he had embezzled thirty thousand dollars?

A. I believe Mr. Einstoss has a written confession from the man.

Mr. Paul: At this time, your Honor, we will produce in evidence the combined statement of the 1949 operation about which I have been asking the witness here very briefly.

The Court: Any objection?

Mr. Monagle: We have no particular objection, except that they are not original records. If he wants them for information, it is all right; for his information, it is all right. The subpoena called for original books and records, may it please the Court, and of course that is what I want. [65]

Mr. Paul: The original books and records are hardly intelligible unless we have someone to work them up. If counsel wants to examine him, the witness, on all the items to justify the items in the combined statement, we are now offering——

The Court: What does the statement show? That is not clear to me yet.

(Testimony of Robert L. Ramsey.)

Mr. Paul: It shows that if Einstoss owns the 86 cases of salmon that is in controversy here and given credit, still Asp owes Einstoss more money.

Mr. Monagle: I grant that, if he owns them, but that is exactly what the case is about.

Mr. Paul: I think what we are trying to do in this case, your Honor, is to rebut the assumption or possibility that Einstoss made some arrangement to leave that salmon with Asp as credit or payment from money due from Einstoss to Asp. We are trying to show the opposite exists. Even if Einstoss took all the 86 cases of salmon, that he still has more money coming from Asp. Now, the evidence on the part of the Asps is that the 86 cases belong to Einstoss.

The Court: Would this table show that?

Mr. Paul: This table includes the 86 cases of salmon.

The Court: But would it show what you say it shows? If you are going to introduce anything like that, you ought to [66] state what it shows, otherwise the Court has to examine it and waste a lot of time trying to determine what it does show.

Mr. Paul: It shows that the 86 cases is included in the computation as owned by S. Einstoss. It shows there cannot possibly be any arrangement by which Einstoss would have given the 86 cases to the Asps in settlement of their account, for instance.

The Court: Because of the fact that there is a balance due Einstoss?



(Testimony of Robert L. Ramsey.)

Mr. Paul: There is still a balance due, even including the 86 cases of salmon.

The Court: Then, as I understand it, you contend the fact there is a balance due Einstoss proves ownership of the salmon in Einstoss?

Mr. Paul: That, coupled with other evidence in the case, does, your Honor. Mrs. Maude Asp admitted to the Marshal at the time of the levy that this salmon belonged to Einstoss. I don't know what other proof we can offer to show that this belongs to Einstoss. The defendant says so, and we say so and prove that there is no possibility, no likelihood, no factual situation exists which would cause Einstoss to transfer ownership to Sam Asp or permit Sam Asp to claim some lien on them.

Mr. Monagle: I don't agree, may it please the Court, that the defendant informed the Marshal they belonged to Sam [67] Asp. The defendant took the Marshal to the fish which were segregated from all other fish out there. The Marshal so testified.

The Court: How would that be admissible against the plaintiff?

Mr. Monagle: It isn't. The other thing, the reason I demanded the original records, it shows right on the face—Mr. Einstoss swears in his affidavit that "on or about August 18, 1949, the affiant and defendants settled their accounts, and affiant paid in full the defendants for any and all services performed under said contract for 1949." Now, he is bringing in here bills and stuff that show on their face they were paid after that. If all the accounts



(Testimony of Robert L. Ramsey.)

were settled, how is it this fish was packed after that date? Another item here, the contract itself shows, "all expense pertaining to chartering tenders, wages for the tenders, is for your account." That is from Sam Asp to Einstoss. The first item, "Tender service, boat 'Wilson', \$2026.99".

The Court: You mean charged against Asp?

Mr. Monagle: Yes. "Boat 'Robert Barron', \$1,458.98." There is \$3,485.97 charged as credit against advances here which are not properly accountable according to Mr. Einstoss' own sworn affidavit. That is why I don't see why we should be bound by some conglomeration of records of Mr. Einstoss'. All the accountant is testifying to is what he got from Mr. [68] Einstoss. I want to see the books, the original entries.

Mr. Paul: Are there any more books or records?

A. No, sir. The books and records are in those files that were turned over there.

The Court: As I understand it, you object to the introduction of this, or are you just calling attention to it?

Mr. Monagle: I object. It doesn't answer the subpoena at all.

Mr. Paul: We have answered the subpoena, and now we are going on continuing to prove our case.

Mr. Monagle: I would like to ask him a question, your Honor.

(Testimony of Robert L. Ramsey.)

Cross-Examination

By Mr. Monagle:

Q. You mean to say Mr. Einstoss has no other books and records except what are there on the Clerk's desk?

A. Concerning this matter, he has no other records.

Q. In other words, he doesn't enter these in any original, make any original entries of these bills of lading and costs and expenses; is that correct?

A. Well, no, it is not correct.

Q. Does he or does he not make original entries in books and records?           A. He does. [69]

Q. Where are they?           A. Right there.

Q. Show me the original books.

A. There is one more file. What happened to it?

Mr. Paul: It must be there.

Q. You mean this?

A. That is right. This is Mr. Einstoss' general ledger where he keeps track of all his accounts for the year. And these sheets are the sheets for this particular salmon received in Seattle.

Q. Where are the books that these sheets are taken out of?

A. This is the book—I mean, there is a black binder. I didn't bother to bring it in the airplane, to save space.

Q. You didn't bring this, did you?

A. Yes, sir.

Q. Now, these are the only books that Mr. Ein-

(Testimony of Robert L. Ramsey.)

stoss had pertaining to his fish operations at Tenakee during the year of 1949; you are swearing to that?

A. Not those two; these besides. There is in here a ledger for the fall season.

Q. And now, these are all the books of account, books of record, that S. Einstoss keeps and that you ever audit in making reports or tax returns or anything else, Federal or otherwise?

A. No. [70]

Q. What other books are there?

A. There is a cash receipts and disbursements.

Q. Where is that? A. In Seattle.

Q. Why wasn't that brought up?

A. I did not know it was required.

Q. What were you told to bring?

A. The papers covering the Sam Asp case.

Q. Just the papers? Nobody told you to bring all the books?

A. May I explain? This cash receipts and disbursements journal would only have five items, would have a limited number of items, which would affect this case. It would be entries of the checks for the operation, and I have copies of those checks, so in that book it would be merely an entry, the amount and the date, and there is copies of those checks in here.

Q. Did you personally enter those in the book?

A. I have very seldom made any entries in Mr. Einstoss' books.

Q. When you say these are exact copies, you are

(Testimony of Robert L. Ramsey.)

just assuming from what you were told by the bookkeeper; is that correct?

A. No, I don't think so, because I know that his books are in balance and those checks are included in the bank account and, therefore, they should be on the account.

Q. Should be. But isn't that the way Mr. Einstoss claims he lost money by another [71] bookkeeper? A. I don't believe so.

Q. If his books are correct, he should have missed that?

A. I don't understand your question.

Q. Mr. Einstoss testified and you testified he was defrauded out of many thousands of dollars?

A. Yes, sir.

Q. There must have been something wrong with the books or he couldn't have got away with it?

A. Actually that would not be the cause of it.

Q. Was it or wasn't it?

A. The entries in the books were not the cause of it. The man obtained checks payable at the bank and in turn got them cashed at the bank. The checks were entered.

Q. Can you tell me why some of these entries were in here, the last file I gave you?

A. You mean the one I just typed up?

Q. No.

A. I just brought those down from Seattle. I don't believe you have ever seen those before.

Q. No; but I think I know some of the stuff that is in here if I can find it. Will you tell me

(Testimony of Robert L. Ramsey.)

why a bill to Keller Fishing and Packing Company, Sitka, Alaska, \$1140.31, is charged against the account of Sam Asp?

A. Well, it isn't charged against Sam Asp.

Q. Does it appear in these books? [72]

A. No.

Q. What is it in here for?

A. I brought that document up for information about cans.

Q. Where is the books that show this entry of that item and the payment of that item.

A. That book that particular item is entered in is in Seattle. It doesn't have anything to do with this case other than for my information.

Q. If it doesn't have anything to do with it, why did you bring it? It reflects the cost of cans, doesn't it?

A. Not for this operation.

Q. For what operation?

A. This particular one is at Sitka.

Q. What information could you get off of this bill of lading and invoice? What did you need that for if it had nothing to do with the operation?

A. To make calculation of cost in cans, and I brought the invoice, if I needed it. As I mentioned, that file, you had not seen that before.

Q. As a matter of fact and truth, those cans were sent and billed to Sam Asp, Tenakee Fisheries, and then sent to Sitka, taken away from the cannery after they were charged to him?

A. I don't think so.

Q. Isn't that why you were told to check these?

(Testimony of Robert L. Ramsey.)

Why was it [73] you brought these or took these cans into consideration if they had nothing to do with the operation?

A. I didn't take them into consideration.

Q. What did you bring them for?

A. I previously told you I brought them for reference.

Q. Reference for what?

A. If I needed the prices of cans during that time, I could look at that and see what they cost.

Q. And going through this—Northwest Reconditioning Company, Keller Fishing and Packing Company, Smith Tower, Seattle, Washington—what reference does that have?

A. It shows the cost of recondition salmon.

Q. It says right on it from Deer Harbor?

A. That is right.

Q. Not Tenakee at all?

A. It has nothing to do with this particular operation. For reference only.

Q. Now, then, this bill of the Keller Fishing and Packing, or check to T. H. Calvert, what did you use that as reference for?

A. Mr. Calvert was an accountant for the operation at Tenakee for Mr. Einstoss.

Q. And what does that purport to be?

A. I think it is his salary check.

Q. Here is another check, Continental Can Company, \$764.56, [74] for cans sold to Keller Fishing and Packing Company, Sitka, Alaska. Where does that appear in these records?

A. Same situation as the previous ones.



(Testimony of Robert L. Ramsey.)

Q. In other words, you needed duplicate copies to find out the price of the cans? A. No.

Q. What is the difference between the two invoices?

A. I don't think probably any difference, but shows two sales at the same price.

Q. You needed two so you could take two invoices to make sure the price was right on each one?

A. That is what was there.

Q. Now, here is a check to Northwest Reconditioning Company for \$844.00 for reconditioning 421 cases and 28 cans of fish. Now, where does that appear in the books?

A. That has been charged to Sam Asp on this analysis of the account. It would be charged to reconditioning of salmon.

Q. Will you show me where that is?

Mr. Paul: It is under "R", reconditioning.

A. This one appears to be a different situation.

Mr. Paul: Oh, I see.

A. This particular check was paid by the Keller Fishing and Packing Company, which is an affiliate company of Mr. Einstoss', and was charged on their books and then from there transferred to Mr. Einstoss' books and would appear [75] as a credit in this ledger here.

Q. Where?

A. He would credit Keller Fishing and Packing for making this payment for him.

Q. I want to see where it is credited.

A. It is presumably in this total, \$109,122.36.

(Testimony of Robert L. Ramsey.)

Q. Where is the book that segregates and shows these charges?

A. I am sorry; that would be in Seattle.

Q. You don't have that? A. No, sir.

Q. Can you tell me where this check is charged? Strike that. Does this check to Conway Dock Company, January 17, 1949, appear in these records?

A. No. That would be prior to this ledger.

Q. Is that all the bills of lading that were given to you in connection with this matter?

A. No. These files here in the court have some more bills of lading; in here.

Q. Now, here is a bill of lading here for a shipment of cases of cans to M. Soley at Sitka, Alaska, on the "Forester" from Tenakee. Will you show me where there is credit allowed for those cases in these records? That is a copy. Here is the duplicate original.

A. Well, I don't understand your question, sir.

Q. Well, there was 480 cases of empty cans made up and 10 [76] cases of lids sent on the "Forester" from Tenakee to M. Soley, Sitka, Alaska. Will you show me where there is any credit allowed for those cans?

A. No; I can't, because there wouldn't be any entry made for transfer of those cans.

Q. Why wouldn't there? They were Sam Asp's cans, and he is charged with them on this book.

A. No. I don't think they were Sam Asp's cans. They were Mr. Einstoss', and he transferred them from Tenakee to Sitka.

(Testimony of Robert L. Ramsey.)

The contract provides that Sam Asp be charged with the cans, and they are charged to him in the original purchase in the book?      A. No, sir.

Q. Where are the records that show the can purchases?

A. The can purchases would be in here.

Q. I just asked you, and you said they wouldn't.

A. You didn't ask me that, sir.

Q. Well, go ahead.

A. I think that would be in here. To the best of my knowledge the cost of the cans would probably have been charged to the purchase of fish.

Q. The cost of cans was charged to the purchase of fish?      A. That is right.

Q. Weren't there checks issued for the cans?

A. The checks were issued by this other company, Keller [77] Company, because they have the contract with the can company.

Q. Who is Keller Fish Company?

A. That is a corporation owned by Mr. Einstoss which normally does all the canning of salmon.

Q. Actually it is S. Einstoss?

A. That would be in a sense correct.

Q. Can you explain, as a certified public accountant, why he runs those kind of purchases through the other books and then charges them against Sam Asp on this book without giving any breakdown to show where payment was made and what he was buying and what Sam Asp was being charged for?

(Testimony of Robert L. Ramsey.)

A. First, nothing was charged to Sam Asp on those books.

Q. What do these books purport to be?

A. That is Mr. Einstoss' general ledger.

The Court: What does it purport to show?

Q. I call your attention to the top of the page—purchases, frozen and fresh fish. That is the top of the page? A. Yes.

Q. What do the books purport to show?

A. I would like to explain. When Mr. Einstoss starts an operation, he advances money to pay for the cost of the fish, and those advances are charged to that account, and there is no account set up as Sam Asp. After the season is over the bookkeeper comes down with what he did with the money, and then he settles with the man in charge of [78] the job. But at the start it is charged to that account—fish purchases.

Q. Now, in August, 1949, do you mean to tell me that the fish purchases at the Tenakee cannery was 191,275?

A. Not for Tenakee. It is for every place.

Q. You told me all you brought were the books that pertained merely to this situation.

A. No. I brought the records for the situation. I brought Mr. Einstoss' general ledger.

Q. As accountant, I want you to point out to the Court what part of that amount was in payment of fish to Sam Asp's cannery.

A. The only way I could tell you that would be to refer to the schedule.

(Testimony of Robert L. Ramsey.)

Q. Where in the books can you show the breakdown?

Mr. Paul: I think the witness has already answered that. He says there is no breakdown except by going to the original bills and making up a separate statement. We have offered that separate statement in court, and it shows some forty-four thousand fish purchased.

Mr. Monagle: I want to see how he arrived at that from these books. How would he justify it if the Internal Revenue asked? I want to find out where the fish were bought.

A. I would show them the schedule.

The Court: What schedule is this you are talking [79] about now?

Mr. Paul: The one I am seeking to have introduced in evidence, your Honor.

Mr. Monagle: I want to know where he got those figures that he put on that schedule. He got them from books in Seattle.

A. No.

Q. Show us.

A. If you will bring the schedule, I will.

Q. I don't want to see the schedule. I know you made that.

Mr. Paul: Look at the original schedule—the Clerk has it right here—of fish purchases. That is what we are interested in, is it?

The Court: Well, who kept these records, or made them, from which the summary was made?

A. Well, the man that was in charge of this operation for Mr. Einstoss at Tenakee made the

(Testimony of Robert L. Ramsey.)

summary of the money advanced by Mr. Einstoss.

The Court: From what did he make the summary? A. From these papers here.

The Court: He kept those at Tenakee and then took them down to Seattle? A. That is right.

The Court: And made the summary?

A. Right. [80]

The Court: The summary that is now offered in evidence?

A. The summary which was here previously and which I revised and which is now offered in evidence.

The Court: We have no one here who can testify that these records brought down from Tenakee are correct. You have to accept them as correct without knowing whether they are correct; isn't that so?

A. No. I would say they are correct because of cancelled checks and documents supporting the payments, bills and so forth.

The Court: The instruments may be genuine in a sense but, so far as bookkeeping is concerned, how do you know they have been entered properly or anything else?

A. We can account for the total advances made by Mr. Einstoss for the operation.

The Court: Doesn't that depend on somebody else's bookkeeping? A. Yes, sir.

The Court: So you are here without any personal knowledge of how this thing is made up?

Mr. Paul: That is not the situation at all, your Honor. There are eight items were advanced to the



(Testimony of Robert L. Ramsey.)

agents of Einstoss who were actually conducting the operations, a total of \$60,000.00, plus a little refund—\$61,123.00. Now, the [81] only trouble that Einstoss is confronted with is finding out where that money went to, and then you go to the original receipts that are produced in the regular course of business, and they are now before the Court, and nine-tenths of them have been already identified by Einstoss, and it balances out. It comes to sixty-one thousand dollars.

The Court: But my point is, is there any way of identifying any of these individual documents with these advances? It seems to me it would take the person who kept the original records to do that.

Mr. Paul: Well, the original records are paid checks and receipted bills.

The Court: But what is there to identify these transactions? I am not questioning that they may be original records. But what is there to identify them with these advances, for instance?

A. Here is the check covering one typical one. No. 6476, \$5,000.00, issued to Marvin Rubenstien.

Mr. Monagle: But that isn't Sam Asp.

The Court: What does that explain? That isn't intelligible to me.

A. Mr. Marvin Rubenstien was Mr. Einstoss' representative there, and he disbursed these funds which he received from Mr. Einstoss.

The Court: That doesn't go to my question. [82] My question is, how do you identify any of these papers with the advances?

(Testimony of Robert L. Ramsey.)

A. Identify them because——

The Court: Well, for instance, you advance \$5,000.00 and then it becomes a matter of showing what became of the \$5,000.00. Then you have to take somebody else's papers for it; you have nothing to do with making it up? A. That is right.

The Court: You have the situation, as I said a moment ago, where the witness doesn't have knowledge that the records themselves are correct.

Mr. Paul: We would have to have thirty or forty people up here to say, "Sure, Sam Asp ran up a bill at the Baranof Hotel about such and such a date and cost so much money."

The Court: You don't need to say thirty or forty people. It seems to me that any kind of a business has somebody who does the original entry work. Now, it seems to me that he would be the one to be here and not somebody who makes up a summary from the original entries.

Mr. Paul: My point is, even going beyond that, if we had Marvin Rubenstien here, it wouldn't be sufficient because payments were made direct to Sam Asp. For instance, the payroll account to Sam Asp, what does Marvin Rubenstien know about that? [83]

The Court: Well, you mean to say that this is such a complicated business that it takes a half a dozen or more bookkeepers to do the original entry work on these books?

Mr. Paul: I think, your Honor, that is a situation that always exists in bookkeeping. Bookkeeping depends upon the regular course of business. Things

look genuine so they are entered in the books or an analysis is made up and, until something suspicious arises, why things go along.

The Court: More than that, the law requires that the person who testifies from records knows that they are correct even though he had nothing to do with making them. That isn't the situation here. Nobody here can testify that these records are correct.

Mr. Paul: Certainly no one is testifying that they are incorrect.

The Court: It has to be the positive thing, that they are correct. That is a prerequisite to their admissibility.

Mr. Paul: I think we can gain the inference, from the fact that Sam Asp made no objection, that they are correct.

The Court: But isn't Jim Cole the one whose objection has to be heard, not Asp? Cole isn't bound by Asp.

Mr. Paul: What has Cole got to do with it, your Honor?

The Court: Isn't he the one that is trying to get [84] a judgment satisfied here?

Mr. Paul: I know, but primarily the business was between Asp and Einstoss. If anybody stands to gain, it is going to be Sam Asp, in making an objection.

Mr. Monagle: Oh, it certainly isn't.

The Court: Unless Sam Asp is subject to a judgment or something, he is not going to stand to gain by it.

Mr. Paul: If the judgment is reduced, he certainly gains by it.

Mr. Monagle: It won't reduce the judgment any by making them bring any honest, correct books of account.

The Court: It just seems to me we have muddled around here for a long enough time now on this case and we never seem to have the records or the witnesses we ought to have. Now, the big objection that I see to it now, particularly in view of the position taken by counsel here in which he questions the authenticity or the correctness of these records, is that the first hurdle is their admissibility, and they don't meet that test because you haven't got anybody here that can testify they are correct. By that I don't mean that you have to have the person who made them, but you have got to have somebody to testify they are correct.

Mr. Paul: Just to keep these records. I don't think we need to do that, your Honor.

The Court: The law requires that the person by whom [85] you seek to introduce records of this kind has got to be able to testify that they are correct of his knowledge.

Mr. Paul: No, not of his knowledge, with all due respect to the Court. Our testimony is that these records were received in the ordinary course of business, and I think testimony to that effect is sufficient.

The Court: I don't think so. That is not my recollection of the law. But if there is going to be any more trouble about these records and their in-

completeness, the only recourse the Court has is to refer it to some accountant. I can't be bothered with this thing piecemeal indefinitely.

Mr. Monagle: They showed by their own evidence, may it please the Court, that half the information is in other books which aren't here, and it is done purposely, I submit.

Mr. Paul: Oh, it is not. The witness testified that the daily cash book is not here, that consisting of eight items, and the eight items are right here.

Mr. Monagle: The subpoena said to bring it.

Mr. Paul: I submit it is an immaterial variation.

The Court: Where counsel questions everything in the way that he does, and he has a right to do that, the books should have been produced, and there was plenty said on that very thing when the case was continued before, the necessity of producing all the records.

Mr. Paul: We thought we produced everything, your [86] Honor. Now, of course I say it is an immaterial variation. If the cash book showed a million dollars was advanced to Sam Asp or the Asp account, still the important thing would be the expenses that were charged. Now, he is not challenging any of the expenses.

Mr. Monagle: Oh, I——

The Court: That is exactly what he is doing.

Mr. Monagle: I haven't got to that yet. I am trying to verify what books are missing, is all I am trying to find now, because I know they are missing, and he does. They are missing. He so testified.

Mr. Paul: All right. How are we going to



identify a bill from the Baranof Hotel or some——

Mr. Monagle: May it please the Court, they can show how much of this \$5,000.00 was spent by Marvin Rubenstien for fresh fish and how much for canned. I can prove he bought fresh fish and shipped it.

Mr. Paul: What has that to do with it? Fresh fish was shipped. Is that the same five thousand or a different five thousand.

Mr. Monagle: That is what I want to find out and the books should show it.

Mr. Paul: I think this is a fishing expedition, I think counsel thinks Einstoss keeps two sets of books and that is it. [87]

Mr. Monagle: I didn't so state. He said he had books in Seattle.

Mr. Paul: We have a man here who prepares all his tax statements except the main one and——

The Court: Well, of course, but he didn't make the original entries here, and a contest of this kind depends on the production of the original entries and, if they are produced and still challenged, it depends on producing as a witness the person who made them, who can say they are correct, or at least a person who can say they are correct.

Mr. Paul: I think the Federal Business Entry Act, your Honor, will permit us to introduce records of this kind.

The Court: Yes, but, as I recall it, it requires that before they can be admitted they be produced by someone who can testify they are correct, and obviously this witness can't do that.



Mr. Paul: Mr. Einstoss testified that these were his business records.

Mr. Monagle: Mr. Einstoss testified he had his books still in Seattle.

The Court: Yes; and he further testified he knows so little about them he couldn't even say they were correct. He admitted that.

Mr. Paul: Let's go back to the original then. Mr. Einstoss identified that "these are original papers from [88] which my books were made up." If we don't take that testimony then we are put upon to identify every single invoice and receipt.

The Court: Well, as I say, you have got to connect up these individual papers with the \$5,000.00 item, for instance, and I don't know how anybody can do that; that merely made a summary, assuming everything that went on before it in the way of original entries and records was correct.

Mr. Paul: Assuming the original papers are correct, why he just matches up \$5,000.00 worth, and there it is.

The Court: He has to assume it. He can't testify that they are. In view of the challenge interposed here, why there ought to be somebody, it seems to me, that can show the connection between these papers here——

Mr. Paul: I am willing to——

The Court: And the disbursement of these advances.

Mr. Paul: I am willing to rest upon this, your Honor, that Mr. Einstoss when he testified personally produced the original records and that he

identified them as his records and that under the description——

The Court: Well, there is nothing affecting that identification. It isn't a matter of identifying them but, as I see it, it is a matter of connecting them up with these items. Otherwise you may have items that bear no relation whatever to these advances.

Mr. Paul: If they come out to an identical amount, what other inference can be drawn?

Mr. Monagle: I submit, they don't. Moreover Mr. Einstoss said he had everything here except the books, and this man brings this whole file with him. That proves Mr. Einstoss was lying because they are not records, and we want the rest of them. That is all.

Mr. Paul: I think counsel ought to be given time to go over these, and Mr. Ramsey will be available. We don't need to occupy the Court's time. I have gone over this situation very thoroughly and I think they all match up.

The Court: Do you want to discuss it between yourselves?

Mr. Monagle: I don't question that he thinks they are all right, but I don't.

Mr. Paul: I have already taken the time and gone over this analysis with Mr. Ramsey.

Mr. Monagle: You might be a little prejudiced in his favor though.

Whereupon, the hearing was recessed until 2:00 o'clock p.m., January 23, 1951, reconvening as per recess with respective counsel present as heretofore; and the following occurred:

Mr. Paul: I understand, your Honor, that Ramsey and Mr. Monagle conferred during the lunch hour; was it? And that [90] he indicated he had no more questions to ask Mr. Ramsey, and accordingly we agreed that he could catch the plane back to his business. Is that correct, counsel?

Mr. Monagle: Yes; I agreed that he was perfectly honest with what books he had to work with, there wasn't anything more he could testify to. He went through everything he had there. The only thing, it is impossible to find anything in that ledger showing the account was made up here. Dig around and ——

The Court: Do you mean, showing how this summary was made up?

Mr. Monagle: Yes. In other words he has made that up from papers and things he received apparently from Einstoss and of course that is all he could testify to.

The Court: You mean these papers that are here now?

Mr. Monagle: Yes. But there are very few of them original entries and no books wherein they are entered. For instance, the only account that these books show at all is, as to Sam Asp or Maude Asp or Salt Sea Fisheries, is the ledger sheet here starting October 7, 1949, and ending October 19, 1949, a period of twelve days. That is the only entry of any kind in any of these books showing any account with Sam and Maude Asp that I could find or he could find.

Mr. Paul: Well, we agreed to this effect, that

the analysis proposed to be introduced in evidence and prepared by [91] Ramsey could not be made up from any ledgers or cash books or journals but instead could only be made up from the checks and invoices and bills and things like that.

The Court: Well, it could be made up, as I see it, either way except that counsel has the right to challenge——

Mr. Paul: I mean that Ramsey did make up his analysis from the original checks and pay checks, invoices, and that he did not make it up from the ledger and journal and cash book.

Mr. Monagle: That is right. It couldn't be made up from the ledger and journal and cash book because it isn't in there.

Mr. Paul: Now, secondly, is the analysis, in so far as Ramsey is able to justify it from the original checks, invoices, vouchers, is the analysis correct?

Mr. Monagle: Well, as far as those go, it is correct, but of course he also went by a statement also apparently prepared by Mr. Einstoss which is attached for the motion for summary judgment here.

Mr. Paul: That was the Tentative Summer and Schedule A?

Mr. Monagle: I don't know what it is supposed to be. It is attached to the affidavit of Mr. Einstoss, saying among other things that on or about the 18th day of August, 1949, the affiant and defendant settled their accounts and affiant [92] paid in full the defendants for any and all services performed under said contract for 1949.

Mr. Paul: That is just a copy of Tentative Summer.

Mr. Monagle: A copy? It is a sworn affidavit. There is a notary public seal on it.

Mr. Paul: Sure. But it is the same thing as Page 3 of the Tentative Summer.

The Court: Well, what about this? Is there a way to determine from each one of those papers and documents just what it relates to, what bearing it has on the issues in this case, so that it can be incorporated in the summary? In other words, what I am getting at is this. Suppose that an accountant with a knowledge of the issues that are involved or with a knowledge of the questions started going through Einstoss' papers, would he be able to select the papers from what they show on their face that should enter into the making of a summary?

Mr. Paul: In a good many instances they are. For instance, here is a debit item, "Bank, Salt Sea Fisheries Account, August 27, 1949, received from Sam Asp in payment of exchange, drew two drafts, \$50.00." This is in the possession of Einstoss, apparently was directed to him. Well, there is a credit item. Then there are numerous other——

The Court: Another question I have to ask is, wouldn't a summary of this kind to be correct have to be [93] prepared from the original entries supplemented by an examination of the papers themselves from which the original entries were made? I just don't see how anybody can walk into an office and pick out at random all the papers that have a bearing on litigation such as this, particularly one who



comes in as an independent account and not one that is connected with the place.

Mr. Paul: Well, independent but very regular, and as far as he knew he had complete access. When a man has worked even as an independent account for three years, he knows if he is getting ahold of everything.

The Court: Well, that would be true if the method of bookkeeping remained the same, but I was led to believe that after the embezzlement of this great sum that the bookkeeping changed.

Mr. Paul: There wasn't any testimony on that particular point, your Honor, but it would have elicited this testimony though, that the bookkeeping essentially did not change, that Einstoss just became a little more cautious, that is all.

The Court: Well, am I to understand now that the parties cannot agree? You do not concede, as I understand it, that this summary is correct?

Mr. Monagle: No, may it please the Court.

The Court: And you further maintain that it is not susceptible of verification? [94]

Mr. Monagle: Not from the books that are in court. That is correct, may it please the Court.

Mr. Paul: I thought counsel's position was this, that the analysis is not correct to reflect the entire position of Einstoss because there are other things not produced in court, but, in so far as the things that have been produced in court, the analysis is correct.

Mr. Monagle: Oh, I grant that quite a number of these things can be substantiated by proof, but



there is no place in these books that you can verify. In other words, if you take the books and take this summary, I don't think there is any bookkeeper in the world could say it was reflected from these books. It just can't be done.

The Court: Well, it seems to me, if those documents there are the basis of all of these debits and credits, for instance, that enter into the making up of this summary, that ought to be traceable to the books of original entry and from them a verification ought to be possible of this summary.

Mr. Monagle: Yes. If they have the books of original entry, then there is no question we could verify it.

The Court: Yes. Then with the two they would certainly be susceptible of verification.

Mr. Monagle: There wouldn't be any question about it then. I think the Court is correct. But those books aren't here. [95]

Whereupon, there was continued discussion between the Court and respective counsel.

(End of Record.) [96]

United States of America,  
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz. James V. Cole, Plaintiff, vs. Sam Asp and Maude Asp, Copartners, doing business under their copartnership trade name

of Salt Sea Fisheries, Defendant, and S. Einstoss, Garnishee-defendant, No. 6184-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 96, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the hearing of the above-entitled cause on the dates hereinbefore set out, to the best of my ability.

Witness my signature this 2nd day of May, 1951.

/s/ MILDRED K. MAYNARD,  
Official Court Reporter, U. S. District Court, First  
Division, Territory of Alaska.

[Endorsed]: Filed May 2, 1951.

[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

United States of America,  
Territory of Alaska,  
First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Order filed in the above-entitled cause and are the ones designated by the

parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 16th day of May, 1951.

[Seal]      /s/ J. W. LEIVERS,  
                 Clerk of District Court.

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[Endorsed]: No. 12951. United States Court of Appeals for the Ninth Circuit. S. Einstoss, Appellant, vs. James V. Cole, Appellee. Transcript of Record. Appeal from the United States District Court for the Territory of Alaska, Division Number One.

Filed May 25, 1951.

                 /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

